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OFFICE OF NATIONAL RECOVERY ADMINISTRATION

DIVISION OF REVIEW

PRICE FILING UNDER NRA CODES

By

Enid Baird

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TRADE PRACTICE STUDIES SECTION

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By

Enid Baird

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FOREWORD

This study of price filing was prepared by Miss Enid Baird of the Trade Practice Studies Section, Mr. Corwin D. Edwards in charge. The statistical analyses and the chapter on Price Structures under Price Filing were prepared by Mr. H. R. Mohat. The chapter on Price Publicity was prepared by Mr. Daniel Gerig, and Sections B and C of Chapter VI. by Morrison Handsaker, Mr. C. A. Pearce, Assistant Coordmator of the section, worked very closely with the Price Filing Unit in the development of the report, and wrote Chapter II on the Statement of the Problem. Appendices on the Asphalt Shingle and Roofing and Steel Castings Industries were prepared by Mr. Frank Stocking and Mr. Walter G. Keim, respectively.

After indicating the character and legal status of pre-code price filing systems, the study considers price filing as a publicity device, as a means of price control, and as a device under which there were certain changes in industrial price structures. The significance of price publicity is analyzed, and as effort is made to state the degree to which price filing systems achieved publicity.

The control of prices through price filing is considered both in instances in which efforts were made to convert price filing systems into systems of price regulation, and in other instances in which the administrative demands of effective price filing systems led directly to supplementary price control. The use of price filing as an instrument for policing other trade practice provisions is also described.

Changes in price structures under price filing are described in a series of case studies of the movement of price levels, the degree of uniformity achieved in prices and terms, and the changes in the relative treatment of different customer groups.

The final chapter of the report gives an account of the character of NRA's administrative supervision of price filing activities and of the gradual development of NRA policy toward price filing.

Appendices contain intensive case studies of price filing in the Asphalt Shingle and Roofing and Steel Castings Industries and an account of the methods used in developing this report.

Limitations of personnel and field work have forced the members of this study unit to conduct their work on a smaller sample and with more haste than was desirable. Their product is mimeographed as a definite contribution to the literature of the subject and as a basis for futher work by interested students. The opinions and findings are individual and not official utterances.

At the back of this report will be found a brief statement of the studies undertaken by the Division of Review.

L. C. Marshall
Director, Division of Review.

March 24, 1936.

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METHODOLOGY AND EXHIBITS OF MATERIALS PERTAINING TO PRICE FILING STUDY

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SUMMARY

Price filing provisions were among the most frequent trade practice provisions in NRA codes. In the Congressional debates which preceded the passage of the NIRA, it was indicated that price filing was expected to be permissible in the codes. Prior to NRA, there had been price filing plans in at least 150 industries. Under the trade practice conference procedure of the Federal Trade Commission, Group II rules for the independent publication and circulation of prices had been written in more than 50 industries.

Since pre-code price filing, although generally based on the ideas of Arthur Jerome Eddy, took various forms, and since the price filing systems under the codes were also various, pre-code and code price filing systems differed to various degrees. In general, however, pre-code systems tended to cover the voluntary filing of past transactions and often the circulation of price information without identification of individual concerns. NRA price filing systems generally provided for mandatory filing of prices and terms of sale below which members could not sell, for the circulation of this price information in the form of identified price lists, and for prior announcement of any changes, with or without a waiting period. Usually these NRA code systems were accompanied by direct forms of price control, such as provisions against sale below cost or provisions for uniformity in some of the terms of sale.

Although the pre-code legal status of price filing was not clear because the leading decisions of the Supreme Court were subject to differing interpretations, it appears that to be legal a pre-code price filing system needed to be divorced from use as a device for raising price levels, and that if the system included the filing of future prices or the identification of individual price lists, these characteristics established some question of its legality. By this standard, most NRA price filing systems would have been of dubious legality.

Price filing was advocated under NRA as a means to promote competition by an increase in information about price, as a means to reduce discrimination among customers, and as a means to stabilize prices. It is not clear that an increase in price information necessarily has the effect of increasing the competitive character of the market. Since modern markets are imperfect, rather than competitive in the sense in which competition is customarily described by economists, there is a possibility that increased information will be used in order to take more effective advantage of the monopolistic elements in each concern's market position, rather than in order to compete more intensively. There is also a possibility that increased information to buyers in the market may promote uniformity of prices not only when discrimination is decreased by such uniformity, but also when it is thereby increased. These possibilities do not depend upon the character of price filing as such, but upon the character and play of incentives in the industry to which it is applied.

The degree to which any result is achieved by price publicity, of course, depends upon the effectiveness with which prices are made public. In more than half the cases studies (a sample of 57 industries), relatively little effective publicity of prices to members of the industry seems to have been accomplished by the price filing system. In a much

larger proportion of cases, relatively little publicity of prices to buyers seems to have resulted. In about a dozen cases, it appears that substantially complete publicity was achieved.

The effectiveness of publicity under price filing systems depended upon a series of factors.

1. The agency which collected the prices needed to be efficient and also to function impartially. When the collecting agency was composed of members of the industry, any lack of impartiality might convert the system into a device by which favored individuals secured advance knowledge about prices. Difficulties in the establishment of collecting agencies also appeared when choice has to be made between local and national centers for price filing.

2. A second requisite of full publicity was the filing of prices by all concerned in the market. In certain cases, difficulty arose because distributors who sold in competition with manufacturers in an industry were covered by different codes and could not be required to file prices. Where efforts were made to solve this problem, they seldom succeeded. Moreover, non-compliance with price filing provisions by members of the industry was a significant interference with publicity. In nearly half of the cases, almost every one filed; in about 40% of the cases, somewhere between half and 9/10 of the industry filed; in about 15% of the cases, a majority of the industry failed to file.

3. A third requisite of effective publicity is full information about prices and terms of sale--technically very difficult to secure. Terms of sale are so numerous that a full filing of them would have been burdensome to the members of some industries. Moreover, in relatively few cases did the industry both plan for a sufficiently complete filing scheme and win NRA's assent to its plan. Efforts were constantly under way to extend the scope of price filing either by code amendment or by rules issued by code authorities. A peculiarly difficult problem in securing complete information was the filing of customer classifications, since there are great difficulties in the way of establishing rigid customer classes, and since so long as any concern was free to shift a customer from one class to another it could use such shifts to evade its filed prices.

4. Comparability of products was also a requisite of code publicity. Difficulty arose both in determining how far price filing should be extended in non-standard products and in finding ways of comparing the products of various producers when specifications were not uniform throughout the industry.

5. A full statement of special types of transactions often was necessary to publicity. Difficulties arose not only in the effort to secure filing of distributor's prices, which has been mentioned above, but also efforts to secure filing of prices made by a concern to its subsidiaries, made in some industries to peculiarly large purchasers, and made in several industries on long-term contracts. Reluctance to make public certain prices and the inherent difficulties of applying the filed prices of the present to contracts written in the past, were central in this problem.

6. In localized industries, the geographic scope of price filing became a problem in publicity. When it was decided to file prices by areas, question arose as to the character of any concern's price in selling outside its home market areas. Difficulty also appeared in industries in which there was no uniform established practice as to whether prices were quoted on a delivered or on an f.o.b. plant basis.

7. Essential to publicity is an adequate distribution of the information filed. In certain cases, the information was not available to buyers, and in other cases it was not available to the entire body of sellers. Methods of distributing information varied from systems in which it was automatically sent out as received to systems in which it was available only upon special request or only by inspection at a central office. In certain cases, discretion was exercised by the filing agency in delaying or failing to circulate some of the prices filed. In still other cases, a problem arose about the distribution of the information by means which would make it available to all members of the industry at the same time.

The requisites of publicity mentioned above appeared in widely varying degrees in different price filing systems. At times the obstacle lay in the wishes of those administering the system, at other times in the inherent technical difficulties encountered. In nearly every case, a full account of the system at work requires consideration not only of the code as written but also of administrative practices established by the code authority and of the degree to which members of the industry conformed to the plan.

The difficulties anticipated as well as encountered in securing full and effective publicity led to a number of limitations on the pricing practices of participating members. In some instances they were established in the codes as parts of the price filing plans or in auxiliary provisions. In other instances their status was less formal, representing in part the body of working rules promulgated by the industry agencies in administering the plans. They raised, in any case, a central issue of price filing under NRA codes, namely, the circumstances in which rigidification or regularization of elements of the price structure was desirable in the interests of comparability and of eliminating or reducing evasion of the publicity requirements through various forms of manipulated and secret pricing. For example, it was frequently urged that product classifications with mandatory price differentials between products were necessary to prevent concessions in the sale of "extras" or non-standard or sub-standard merchandise; that mandatory and uniform definitions of customer classes were essential if the shifting of individual buyers from one classification to another for purpose of granting more favorable discounts was to be avoided; that it was essential for prices to be quoted on a delivered basis if they were to be comparable and if secret concessions through payment of delivery charges were to be prevented; that terms of payment, allowances, guarantee policies, consignment practices, etc., must be standardized to eliminate their use as devices for indirect pricing; that the adherence of distributors, not under the scope of price filing plans, to published resale prices was imperative if those manufacturers who competed with them for the consumer market were to be safeguarded against their competition.

In the majority of cases studied, however, it appeared that the interest in such controls extended considerably past their uses as aids to more effective and accurate comparability and publicity of prices and terms. Interested code proponents were patently reluctant to place their entire dependence for price stability and other ends of price control upon the indirect and uncertain action of more complete exposure of pricing practices. They sought, and often obtained, in the codal charter for the price filing plan, specific limitations, or grants of power which would permit them to place limitations, upon practices which they considered prejudicial to their individual and common interests. Without this authorization the price filing agency frequently found it possible by way of exercising necessary administrative discretion to impose or suggest strategic and complementary controls over price levels, price changes, methods of distribution, geographic relations, various elements of the price structure, and even the division of business.

Price filing under NRA codes thus was not merely a matter of promptly and fully broadcasting prospective pricing practices of business rivals. Rather in many instances it was a going cooperative effort wherein the devices of publicity and direct controls were functionally related and joined in focusing on certain major group objectives.

In other cases price filing served clearly in a capacity of policing conformance to controls established by other code provisions or to more or less precise standards of certain interests of the industry. As an outstanding example, cost provisions were almost invariably accompanied by plans for price publicity and intimately related in their administration.

Although the waiting period was by no means always a necessary element for either the publicity or control program, it had a significant and often strategic role to play in each.

The relative scarcity of statistical material makes it impossible to present a broad picture of the movement of prices under price filing in an adequate sample of different kinds of industries under different kinds of price filing systems. Nevertheless, sufficient information is available to make clear that variety, rather than similarity, characterized such price movements.

In certain industries, prices rose during the price filing period; in others, they showed little change; in still others, they fell, sometimes sharply. There are cases in which, within the same industry, one group of prices declined and even showed the characteristics of a price war, while other prices remained the same or rose slightly.

These changes in price levels were sometimes accompanied by a decrease in the spread of prices from one customer group to another. In other cases, the divergence of treatment among groups of customers increased during the price filing period. There are instances in which, under price filing, terms of payment, customer classifications, freight charges, and the like became uniform. There are other cases in which efforts at uniformity in terms of sale broke down and were abandoned. In some industries, prices and terms of sale remained unchanged during

most of the code period; in others, they changed frequently; and in still others, an early change was followed by a period of relative stability. It has not been possible to analyze the individual cases to the extent necessary to determine whether these varying results may be correlated with particular kinds of price filing systems or with particular characteristics of the industries affected.

The imperfect drafting of price filing provisions, the lack of clarity as to the permissible scope of price filing activity, the efforts by code administrative agencies to extend their program of action beyond the limits set by the exact wording of the codes, and the frequent controversies over the alleged effects of price filing plans united to make the administration of price filing provisions a major problem in the NRA. For the most part, in the early period during which most of the codes were written, price filing plans were adopted with very brief consideration and without much evidence either as to the problems to which they would be applied or as to the administrative machinery they would involve. Even at the end of the code period, the NRA had collected very little information about the operation of price filing plans and considering the number of codes involved, had engaged in relatively little formal administrative action such as amendments, interpretations and stays of code provisions or exemptions therefrom. An increasing effort was being made, however, to supervise the activity of code authorities in administering open price plans, particularly for the purpose of preventing actions not authorized by the code. In certain cases, code authority rules had been countermanded and even the code provisions themselves had been stayed. More frequently, however, an informal administrative supervision had developed as a measure of prevention against abuses.

Violations of open price provisions were among the most frequent of code violations and demanded a great deal of the attention of the compliance agencies. About 45% of the trade practice compliance cases were violations of price filing provisions.

As experience accumulated, NRA began to develop a rather definite policy about the purposes and extent of price filing. Opposition of certain advisory groups within NRA, and of complainants outside, first found full expression in the price hearings of January, 1934. After these hearings, a temporary policy of refusing to approve waiting periods in new codes was inaugurated, and studies of the operation of open price systems were undertaken. In June, 1934, Office Memorandum No. 228 established a definite policy as to price filing provisions. They were to be approved in a form which was thought to make them useable as publicity devices but not as a means of price control. In spite of widespread opposition outside the NRA and some reluctance to accept the policy on the part of administrative personnel, this general view of the function of price filing remained the official policy thenceforward. The application of the policy to codes already approved, however, was relatively slight; for it was decided that existing provisions should be modified only when they showed clear evidence of abuse or of major administrative difficulties.

As it became clear that Office Memorandum No. 228 did not change existing price filing provisions, the peculiarly difficult problem of tie bids under price filing in the awarding of contracts by government purchasing agents was dealt with by authorizing all bidders to quote as

much as 15% below their filed prices upon such contracts. In spite of very strong opposition, this authorization remained in effect during the rest of the life of NRA.

In a series of decisions about various technical difficulties in securing adequate publicity for terms of sale, NRA took the view during the winter of 1934-35 that code authority action to require adherence to a rigid set of terms of sale was not acceptable, but that action to require fully descriptive filing of the terms in use by particular concerns was essential to the operation of price filing systems.

Shortly before the Schechter decision, a policy statement by the National Industrial Recovery Board reiterated the view that price filing is acceptable for purposes of price publicity, set forth certain technical essentials of a price filing plan, and held that, even when properly limited, price filing provisions should apply only in industries in which price competition tended to be excessive, and not in industries in which there was danger of monopoly.

Appendices to this report contain detailed accounts of the experience of the asphalt shingle and roofing and steel castings industries with price filing provisions. A statement of the methods used in preparing this report is also contained in the appendix.

CHAPTER I

INTRODUCTION

I. THE INTRODUCTION OF PRICE FILING TO THE NRA

The NRa was virtually committed to an experiment with open price plans before the National Industrial Recovery Act had been approved by Congress. During the debate between Senator Wagner and Senator Borah over the addition of the words "price fixing and restraint of trade" to the anti-monopoly clause of the Act, price filing was cited by Senator Wagner as one of the more salutary measures which should be permitted under the codes, but one which because of past anti-trust decisions, might conceivably be denied to industry if the anti-monopoly clause were broadened to include a prohibition of activities in restraint of trade.

Senator Wagner explained that what he wanted to see permitted was the exchange of market information, such as was declared illegal in the American Linseed Oil Company Case.(*) Senator Wagner's comments ignored the more liberal decisions of the Supreme Court in the later Maple Flooring and Cement Cases,(**) in 1925, in which it had been held that such activities of open competition were not unlawful if properly conducted without agreement or concerted action. The choice of the earlier case makes it fairly apparent that it was his intent to clear away all doubts of the legality of open price activities under NRA by placing them within the realm of discretionary suspension of the anti-trust laws. (***)

(*) United States v. American Linseed Oil Company, (1923) 262 U. S. 371. This decision, rendered June 4, 1923, did not in the opinion of most commentators actually declare the exchange of information illegal, but condemned the total activities of the Association as constituting a combination in restraint of interstate commerce within the meaning of the anti-trust acts, It did, however, tend to discourage such activities by trade associations until later decisions covering price reporting and exchange of statistics. See Section E below.

(**) Maple Flooring Manufacturers Association v. U.S. (1925) 268 U.S. 563 Cement Manufacturers Protective Association v. U. S. (1925) 268 U.S. See Section E below.

(***)Cf. Legal Division Bulletin No. 14, "Open Price Systems and Illegal Price - Fixing under the NIRA with reference to Monopolies and Restraint of Trade"; NRA Files.

Congress, in defeating the Borah Amendment, seems to have concurred in this sentiment. The way was patently clear for industry to propose forms of open price activity to be incorporated in codes of fair competition, with every reason to believe that these would be acceptable to the Administration. Indeed, one commentary by an NRA legal counsel suggested that approval of open price proposals was almost mandatory in the light of the Congressional action reported above. (*) It is apparent that price fixing, as such, was clearly condemned. However, it is also quite clear that Congress definitely desired to avoid the former decisions which outlawed any form of price listing, including the open publication of prices. What the authors of the Act had in mind was price stability to eliminate the evils of ruthless competition. Hence open price systems, free from price-fixing, were valid under the NRA.

In the writing of the Codes price filing provisions were inserted on a wholesale scale, without show of need or other special plea. The limited suspension of the anti-trust laws in the enabling Act removed, the legal restrictions and uncertainties created by the Supreme Court's open price decisions. Consequently, the typical NRA price filing plan, as discussed in Section III-B of this chapter, represented a marked departure from tradition.

There was, in 1933, little information regarding the economics of price filing, whatever the type. The Federal Trade Commission had made a study of open price association in 1929, but the results of its statistical analysis were admittedly "rather negative". (**) Price filing was still an experimental device. The present report adds to the growing body of experience regarding price filing, the NRA experience during the less than two years of operation. Efforts are made herein to contribute to the understanding of price filing in general. Special attention, however, is paid to the type of price filing peculiar to NRA.

Price filing provisions appeared in the codes of four hundred and forty-four industries. Three hundred and nineteen of these made the establishment of price filing mandatory, while one hundred and twenty-five left the question of actual establishment to the decision of the Code Authority or to industry vote. The results of a questionnaire sent to former code authority secretaries indicate that many industries never put these provisions into operation, even when the code had made them mandatory. Precise information is lacking upon the point, but from the returns received, there are indications that in as many as one-third of these industries price filing was never set up. This study has been confined to the experience in only fifty-seven of the industries whose codes contained a price filing provision. The observations and generalizations made herein are based upon this "sample", excepting where

---

(*) Undated memorandum entitled "Memorandum of Law Considering the Legality of Code Provisions Regarding the Filing of Prices" by George J. Feldman, Assistant Counsel of Litigation Division of NRA. In NRA Files.

(**) Open Price Trade Associations, Senate Doc. 226, 70:2, 1929, page 355. See also Chapter I, section II below.

otherwise noted. (*). Due to the care taken to select a sample which would be, with respect to a number of diverse characteristics, a typical cross-section of codified industries, it is felt that the findings rest upon a base broad enough to provide helpful suggestions relative to industry generally.

The remainder of this chapter is concerned with a history of pre-NRA price filing plans and comparative descriptive definitions of price filing before and under NRA. Only in this way can a degree of historical perspective be gained of price filing under NRA.

II. THE HISTORY OF PRICE FILING

A. Pre-Eddy Plans

Although Arthur Jerome Eddy was the first to set forth systematically the mechanism of price filing itself as a device for the stabilizing of business, certain historical roots from which he probably received his original ideas regarding the "new competition" have been pointed out. These early developments are discussed by Milton Nelson in his book, "open Price Associations," (**). Nelson distinguishes three stages of cooperative development which may have led up to the associations organized by Eddy; these stages are best illustrated by the Iron and Steel Industry. The first consisted of combinations in which competitors formed associations for the prime purpose of fixing prices, regulating output, and dividing business on a percentage basis. This period ran approximately from 1897 to 1904. These associations were significant in the development of price filing because members were required to report monthly their output, orders taken, and tonnage shipped, in order that the controls could be administered. After being checked and compiled by the commissioner administering the plan, the compiled reports were sent to members. Nelson believes that this reporting of statistics may have given Eddy his original inspiration.

These associations, abandoned about 1904 as a result of more vigorous Governmental efforts to enforce the Sherman Act, were succeeded by the so-called Statistical Associations, which continued until 1907. The reporting of production, orders, and shipments, was continued. However, there were no binding agreements regarding prices or production, backed by a money penalty. The moral obligation to abide by the percentage allocations established earlier may have persisted. The difference, according to Nelson was that:

> "the purpose in doing so is no longer that of determining what penalties or credits may be due members for exceeding or falling of alloted quotas , but of keeping members informed as to whether they have been maintaining the same relative position in the industry that they had previously occupied." (***)

(*) See appendix C, Exhibit I for list of industries included in the sample and method of selection of sample.

(**) University of Illinois Studies in the Social Sciences, Urbana, 1923; see particularly Chapter II

(***) Op. cit., p. 32.

The third stage was that of the "Gary dinners". These ran from 1907 until 1911, when the Government brought suit against the United States Steel Corporation. It was from these, according to Nelson, that Eddy received most of his stimulus. Eddy was a close student of the Gary methods and was quick to appreciate the possibilities of legal methods of cooperation. The two concepts introduced by Gary, which Eddy made the foundation stones for his own system, were the spirit of competitive cooperation and the free and frank exchange of information between competitors.

B. The "Eddy Plan"

Mr. Eddy invented the name of "open-price association" and expounded the theory of open prices in a book, "The New Competition", published in 1912. As a lawyer, he was particularly familiar with anti-trust cases and accordingly with trade association activities. In advocating the use of "open prices" he was speaking of both a philosophy and a particular mechanism. His philosophy of "open competition" has been repeatedly proposed by later exponents of the plan and survives today, almost unchanged. It is described as the philosophy of honesty and openness in business -- an openness defended on both economic and ethical grounds as one that leads to cleaner competitive practices, to the elimination of deception, secret prices, cuts, and rebates, and eventually to more stable and profitable business operations.

Eddy advocated cooperative methods for putting this philosophy into practice through the open price association. This mechanism was described in detail in his book, with instructions for using it in an industry such as the Construction Industry, where work is done on contracts awarded on the basis of bids. He indicated that with certain modifications the plan was adaptable to manufacturing and distributing industries as well, but did not set forth these modifications at that time. Briefly, Eddy's plan encompassed a procedure somewhat as follows:

(1) A unanimous agreement by members of an association to tell the truth about prices and other competitive elements.
(2) Selection of an absolutely impartial secretary to receive information from members.
(3) Filing with this secretary in a central office copies of
    (a) all inquiries;
    (b) all bids;
    (c) all contracts.
(4) The compilation by the secretary of a weekly bulletin which was to include an accurate estimate of volume of work in sight. Eddy opposed the exchange of inquiries for fear of collusive bidding.
(5) The exchange of information concerning bids on one of three bases, as acceptable to members.
    (a) After the contract is awarded;
    (b) By interchanging bids as rapidly as they are received; or
    (c) (Preferable but the most difficult to attain), the open posting of all bids as received.

(6) The reporting of the contracts as and when closed to permit comparison with the bids.

Certain warnings given by Eddy in connection with the open price plan were repeated so emphatically that they became almost parts of the Eddy Plan itself. These include:

(1) No bidder should be bound to adhere to his bid for one fraction of a second.

(2) There must be no agreement or implied obligation not to cut bids or to conform to any prescribed methods of pricing.

(3) The handling of reports should be a routine matter with the Secretary's office acting only as a clearing house.

(4) The introduction of the open price plan should proceed slowly on the basis of a growth of mutual confidence.

(5) Improved conditions should not be expected immediately and relief in the form of better prices was uncertain.

In the later speeches and trade association practice Eddy amplified his ideas somewhat, and gave some suggestions as to methods of open price filing in types of industries other than those using contracts. The chief characteristic of such methods was to be the prompt filing of list prices and all variations from them as made.

As counsel for various trade associations, Eddy saw his plan put into operation and subjected to the test of experience. As a result of this experience, his attitude regarding the disclosing of information about future prices was apparently changed from a critical to a favorable one. With this exception, the later expression of his views is very similar to the earlier ones. In the constitution of the National Fence Manufacturers, for which group Eddy was counsel, the object of the association was stated to be:

> "The bringing out into the open of all competitive conditions and the introduction of the open price policy, to the end that whatever price information is distributed will be absolutely accurate and confined to purely statistical information regarding sales and prices that have been actually made. Nothing herein stated permits any member of the institute to file any information regarding any price which he expects to make or would like to attain.
>
> "No penalties: There are no penalties of any kind or character with the operation of the institute. Members may or may not file information called for by the reporting plan hereinafter set forth; if they do not file they get no information; if they do file they get like information in return.

"No Secrecy: There is nothing secret about either the meetings or the operations of the institute. All its proceedings are reduced to writing and carefully preserved in the minutes and the same will be duly filed with the Federal Trade Commission upon their request. Customers may attend meetings and become familiar with the operations of the oganization upon invitation. Members are free to write competitors who are not members to attend meetings.

"No restraint: Nothing in the plan or operation of the institute shall be understood or construed as directly or indirectly restraining the freedom of any member to at all times quote such prices and terms as he pleases, provided he reports to the secretary such transaction as herein provided in the reporting plan."(*)

C. Developments Subsequent to 1912

As Nelson has pointed out, the open price movement was further popularized by the Babson Statistical Organization, which in both 1914 and 1915 devoted a session to it at conferences for manufacturers. This organization also published, as a part of its services to manufacturers, a series of bulletins intended as guides to those industries which were ready to introduce an open price plan. Many adaptations of the Eddy mechanism for price filing were gradually established. Some of these, though called open price associations, abandoned many of the characteristics specified in the Eddy Plan. Some of these changes were the result ofthe extension of the plan to a wider variety of industries; others were influenced by the intervening court decisions bearing upon price and other statistical reporting activities. In 1921 the Federal Trade Commission made a short survey of open price associations, and on the basis of questionnaire returns from 1515 trade associations, reported the existence of one hundred and fifty open price associations which were distributing or exchanging price information. At about the same time Nelson listed one hundred and seventeen associations which were reputed to be doing open price work. (**) The following fourteen industries included in the present study, were reported by him to be doing open price work at that time: asbestos, metal lath, copper and brass mill products, builders' supplies, paper and pulp, cordage and twine, candy manufacturing, steel castings and business furniture.

D. The "Cooperative Plan" of the Department of Commerce.

During his years as Secretary of the Department of Commerce, Mr. Hoover was an active advocate of open price plans. In 1921 the Department of Commerce began the publication of the Survey of Current Business, based in large part on trade association statistics. A "Cooperative Plan" for the distribution of statistics gathered by trade associations was developed. In this, the Department offered to receive, and give

(*) Federal Trade Commission, op. cit. p. 10.

(**) Op. cit., Appendix, Exhibit I

wide publicity to, the information on production, prices, shipments, capacity, stocks, orders, wages, etc., collected by trade associations. The three principal features of this plan were:

(1) Widest practical publicity

(2) No indentification of the figures with the business of any individual, and

(3) The requirement that the other activities of the association "be reasonably far enough removed from the twilight zone so as not to make the association an obvious target for legal attack, in the light of existing court decisions. While there is no legal immunity afforded to any association which enters this cooperative arrangement, the department obviously does not care to cooperate with an association along statistical lines when the association's other activities are such that might easily bring about prosecution." (*)

Pursuant to the point of view expressed in this plan, the Department of Commerce expressed itself as not in sympathy with open-price associations "which are collecting data on prices and sales of their individual members and circulating such individual data again to their members together with certain other activities." (**) The emphasis in this statement was upon the questionable character of those open price plans which included with the distribution of prices the identification of the seller.

The decisions of the Supreme Court in the American Column and Lumber Company, and American Linseed Oil Company cases (***) created a state of uncertainty regarding the future of open price systems. A series of letters between Secretary Hoover and Attorney-General Daugherty during 1922 and 1923 did little to clarify this situation, except to indicate the divergent views of the two correspondents on the collection and dissemination to trade association members of detailed trade statistics, including prices in closed transactions. (****) As a result of the restrictive nature of the court decision in the American Column and Lumber Company case, Secretary Hoover in his annual

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(*) The details of this plan are quoted in Federal Trade Commission, op. cit., Appendix A, p. 377

(**) Statement of Secretary Hoover before trade association conference in Washington, D. C., April 12, 1922, quoted from Federal Trade Commission, op. cit., p. 19

(***) See Section E below

(****) See Federal Trade Commission, op. cit., p. 20ff.

report for 1922, called for a modification of the anti-trust laws, which, under the court interpretation, "in some directions are out of tune with our economic development"; he distinguished between those cooperative activities which redounded to the public benefit and those which were made the occasion of abuse. (*) Following the sweeping adverse decision in the American Linseed Oil Co. case, in his annual report for 1924 he called for a new "legislative definition" of the permissible scope of cooperative activity, and cited over twenty functions which cooperative procedure might well be allowed to perform. (**)

Professor Fetter has suggested that Justice Stone, who wrote the majority opinions which substantially reduced judicial disapproval of open price systems in the two subsequent decisions, may have been influenced by his earlier years in the Cabinet, as Attorney General at the time when Secretary Hoover was expounding his views on open price systems.(***) If this is true, the early attitude of the Secretary of Commerce exerted great influence over the subsequent development of open price systems.

E. The Supreme Court Cases

The United States Supreme Court has rendered four major decisions which have broadened the concept of open prices, and defined their position in relation to the anti-trust laws. These were made between 1921 and 1925. The cases are discussed below. In addition, a discussion of the Appalachian Coals decision of 1933 is included, while not concerned specifically with open prices, this decision throws light on the recent trend of the Court's attitude toward cooperative activity. (****) Finally, there is included a brief summary of the issues presented in the Sugar Institute case argued before the Supreme Court in February, 1936.

1. The Hardwood Case.

In American Column and Lumber Company v. United States, 257 US. 377 (1921), the court was asked to pass upon the legality of the activities pursued by an association of hardwood manufacturers. The members thereof, representing one-third of the hardwood output of the country

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(*) Department of Commerce: annual Report of Secretary of Commerce, 1922, pp. 29-31.

(**) Pp. 22-24

(***) F. A. Fetter, The Masquerade of Monopoly, New York, 1931, p. 219 Narcourt Brace and Company.

(****) The following discussion of the five Supreme Court decisions is quoted in large part from "Anti-trust Laws and Unfair Competition", by George J. Feldman, Work Materials, No 1, of the Division of Review, NRA, July 18, 1935, pages 25-31 Legal Studies.

forwarded to the central office of the association elaborate statistical reports of stock on hand, production, shipments, prices, and names of purchasers. The secretary of the association mailed to each concern summaries of the statistical matter and of reports containing the views of each member as to market conditions and production for the following few months together with expert analysis of the reports, and suggestions as to future prices and production. Members of the association held frequent meetings at which market conditions and production were discussed. The majority of the court, speaking through Justice Clark said at page 411:

> "Convinced as we are, that the purpose and effect of the activities of the 'Open Competition Plan' hereunder discussion, were to restrict competition and thereby restrain interstate commerce in the manufacture and sale of hardwood lumber by concerted action in curtailing production and in increasing prices, we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the anti-trust act of 1890 (26 Stat. 209) and the decree of that court must be affirmed."

The decision in this case was not unanimous; Justice Holmes and Brandeis delivered dissenting opinions. The former contended that a combination to distribute knowledge, notwithstanding its tendency to equalize prices, was far from a combination in unreasonable restraint of trade. Justice Brandeis, with whom Justice McKenna concurred, emphasized that there was no coercion, monopoly, division of territory, or uniform prices; that all information distributed under the plan was made public, and all reports and market letters were filed with the Department of Justice and with the Federal Trade Commission; that before the initiation of the plan the large lumber dealers were able to take advantage of the ignorance of the isolated producers; that editorial comment and free discussion were essential to rational competition and intelligent conduct of business; that the majority had misconstrued the evidence in concluding that there was any purpose to curtail production, or that such restriction was in fact realized; that

> "there is nothing in the Sherman Law to indicate that Congress intended to condemn cooperative action in the exchange of information, merely because prophecy resulting from comment on the data collected may lead, for a period, to higher market prices.... The illegality of a combination under the Sherman Law lies not in its effect upon the price level, but in the coercion thereby effected....The evidence in this case, far from establishing an illegal restraint of trade, presents, in my opinion, an instance of commendable effort by concerns engaged in a chaotic industry to make possible its intelligent conduct under competitive conditions;"

and that the court's condemnation of those activities was difficult to reconcile with its toleration under the Sherman Law of powerful industrial mergers and consolidations.

2. The Linseed Oil Case

The Linseed Oil Case, decided June 4, 1923, holds a special interest for this study because of the reference made to it by Senator Wagner in the debates on the National Industrial Recovery Act.

In United States v. American Linseed Oil Co., 262 U. S. 371 (1923), twelve manufacturers of linseed oil entered into an agreement, with provisions for a financial forfeiture in case of violation, and for the maintenance of a bureau which gathered and distributed information among the members as to price lists. Members agreed to adhere to schedules of prices and terms which they furnished to the bureau and to give notices of departure therefrom. They were required to report all variations of price, name of prospective buyer, point of shipment, exact price, terms and discounts, whether sales were made to jobber, dealer or consumer, and to report all orders received, all such information being treated as confidential and concealed from the buyers. The information thus collected was reported to the members through statistical surveys made by the bureau. Each member was required to furnish the bureau, upon request, information with regard to any buyer and might require the bureau to secure similar data from all members under specific conditions. The bureau made industrious efforts to prevent sales at prices below the scheduled lists. Monthly meetings were held, at which "matters pertaining to the industry" were discussed. The Court decided unanimously that the scheme was an illegal combination under the Sherman Act, but the language of Justice McReynolds, who spoke for the Court, reveals that the chief consideration was the power which the combination was enabled to exercise over a competitive market:

> "With intimate knowledge of the affairs of other producers and obligated as stated, but proclaiming themselves competitors, the subscribers went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions. Obviously they were not bona fide competitors; their claim in that regard is at war with common experience and hardly compatible with fair dealing.
>
> "We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contact or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection....Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties."

3. The Maple Flooring Case

In Maple Flooring Manufactures Association vs. United States, 268 U.S. 563 (1925), the association distributed among its members information as to the average cost of production, which was based upon reports of individual costs of raw material and of operation. It also compiled and distributed information concerning freight rates from basing points to various markets, enabling members to quote delivered prices.

Members reported information as to the quantity and type of flooring sold, dates of sales and prices received, average freight rates, commissions, stock on hand and unfilled orders, monthly production and new orders. This information, which concerned only past transactions and did not include names of purchasers or current prices, was summarized by the Association and reported back to the members, without revealing the identity of members in connection with specific information. The reports prepared by the association were given wide publication through trade journals, and were communicated to the Department of Commerce. Monthly meetings were held by the members of the association at which "problems of the industry" were discussed, with no evidence of discussion or agreement upon prices. The majority of the Court decided that in these activities no violation of the Sherman Act was involved. The Hardwood and Linseed Oil cases were distinguished on the ground that the facts in those cases revealed "concerted efforts" of the defendants to curtail production and raise prices. But this distinction is by no means convincing, particularly because the language of the Court approving the activities in the present case is virtually identical in reasoning and point of view with the dissenting opinions in the Hardwood case:

> "Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent overproduction and to avoid the economic disturbances produced by business crises resulting from overproduction. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful....General knowledge that there is an accumulation of surplus of any market commodity would undoubtedly tent to diminish production, but the dissemination of that information cannot in itself be said to be restraint upon commerce in any legal sense. The manufacturer is free to produce, but prudence and business foresight based on that knowledge influences free choice in favor of more limited production. Restraint upon free competition begins when improper use is made of that information through any concerted action which operated to restrain the freedom of action of those who buy and sell.

....Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry; who gather and publish statistics to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information."

4. The Cement Case.

The fourth in a series of cases involving open price filing which came before the Supreme Court was Cement Manufacturers Protective Association v. United States, 268 U. S. (1925). In this case the Court approved the cooperation of manufacturers in gathering and exchanging information concerning production and prices in so called "specific job" contracts, general statistical information, and information about transportation costs from various points of production. A specific job contract was a contract which obligated the manufacturer to deliver at the stipulated price, to the contractor at some future date, the cement required to complete a specified construction project, with the understanding that the purchaser be allowed the advantage of any decline in market price, and without obligating him to take the cement if he failed to secure the bid or if for any other reason he did not desire delivery under the contract. The details of such contracts, including names of contractors and specified construction projects involved, were reported by the members to the association; it employed agents to visit the jobs, and reported back to the members full information regarding the contracts and the use of the cement shipped under them. These activities were pursued in order to prevent contractors in a period of rising prices from obtaining more cement than they were entitledtoby entering into contracts with several manufacturers for the same specific job. This was considered sufficient purpose by the Court to excuse the reporting of detailed information, including names of buyers and sellers, and what amounted to espionage by the association. In addition to supplying information about specific job contracts, members rendered monthly detailed reports concerning delinquent accounts of their customers and concerning production, shipments, and stocks on hand. The association compiled and distributed these, thus informing each member of the source and amount of cement available. Meetings were held at which minor subjects were discussed, but such dangerous issues as current prices, production, or market conditions were carefully avoided. The association also distributed to its members freight books listing rates from basing point to all markets. The Court found that the freight rate book enabled the manufacturer to calculate a delivered price on the basis of his own mill price to points in nnighboring territory, and to determine the freight differential which he must offset in his mill price in order to compete with manufacturers in other territories. The Court refused to condemn the distribution of credit information, on the ground that there was no evidence of any unified conduct with respect to the persons to whom, or conditions under which, credit was to be extended; and further that the credit

information merely amplified the individual judgment of the manufacturers. The compilation and distribution of general statistical information was approved on reasoning similar to that in the Maple Flooring case. The Court declared that the tendency to bring about uniformity in price, apart from any agreement or understanding for maintaining prices, was insufficient to constitute a violation of the anti-trust laws. The traditional theory that uniformity of price is evidence of price manipulation was rebutted by the opinions of economists, who said, in effect, that in the case of a standardized product sold wholesale to fully informed professional buyers, uniformity of price was a sign of free and active competition.

5. Summary of the Four Cases

In attempting to arrive at an estimate of the Supreme Court's attitude toward open price filing, one must emphasize that the Maple Flooring and Cement Cases are far more significant than the two earlier decisions. In fact certain commentators have concluded that the two later cases effectually overrule the earlier ones. Though there may be no need to accept this contention, it is nevertheless true that the distinctions advanced by the Supreme Court itself, and further discussed by commentators, are tenuous. The Court pointed out in the Maple Flooring Case that the reports of sales and prices were solely concerned with "past and closed transactions", as contrasted by the facts in the Hardwood and Linseed Cases. Again, the statistics reported by the Maple Flooring Association did not identify buyers and sellers, as was true in the Hardwood Case. It is true that such identification was present in the Cement Case with regard to specific job contracts, but it was excused in view of the Association's commendable purpose in preventing fraud by contractors. Furthermore, the data collected by the trade associations in the latter two cases were not treated as confidential, in contrast to the policy pursued by the Linseed combination. The distinction, however, is of questionable soundness, for the publicity afforded by the Hardwood Association was much wider than that which the Court found, by inference, in the Cement Case. There was no evidence in either the Maple Flooring or the Cement Case of any obligation or understanding on the part of the members of the Association to be guided in their business policies by the information supplied through the Association. The distinction, however, is likewise difficult to follow, for the Court found such an understanding in the Hardwood Case, although there was no uniformity of prices, and refused to draw the same inference in the Cement Case, where such uniformity existed. In the Linseed Case the Court's finding of "concerted efforts" was better supported by the fact that the combination was composed of a small number of powerful concerns, and that their obedience was compelled by means of forfeitures and penalties. It is possible to isolate the Hardwood Case, when it is considered that the Court stressed the "comments" and "recommendations" with regard to production and prices by and official of the Association. In the Maple Flooring and Cement Cases the Court emphasized that at the periodical meetings of members of the Association there was no evidence that prices were discussed. And the Supreme Court has distinguished between reports of "past" sales and "current" or "future" transactions. Finally, the Court expressed disapproval of the industrious efforts of the bureau in the Linseed Case to secure compliance with published prices.

Though it appears evident that the attitude of the Supreme Court towards the reporting of trade statistics underwent a substantial change between the two earlier and two later decisions discussed above, and that the distinctions sought to be established between the cases are in large part tenuous and without substantial basis, it is impossible not to conclude that a price filing scheme which is sought to be used as a device for the raising of prices will be considered by the Supreme Court as a violation of the Sherman Act.

A recent analysis of the anti-trust decisions relating to price

filing has classified the presumptively legal and illegal elements of price filing systems. (*) In it are set forth in parallel columns, as below, (I) a plan which is presumptively lawful, (II) a plan which is clearly unlawful, and (III) the modifications necessary to render the second plan of probable legality.

I. Presumptively lawful plan

1. Detailed reports to association of all closed transactions.
2. Circulation of abstract, statistical summaries.
3. Availability of reports to customers and the public.
4. No agreement affecting freedom of price action.

II. Clearly unlawful plan

1. Filing current and future prices.
2. Circulation of prices of individual sellers.
3. Non-disclosure of reports to customer and the public.
4. Agreement not to deviate from filed prices, without notification of change to association.
5. Immediate report by association of all price changes.
6. Waiting period.
7. Circulation of interpretative com ents.
8. Penalties for non-compliance with plan.

III. Changes necessary to render Plan II. presumptively lawful

1. Detailed reports of all closed transaction and filing current and future prices.
2. Circulation of abstract, statistical summaries.
3. Availability of reports to customers and the public.
4. No agreement affecting freedom of price action.
5. No waiting period.
6. No interpretative comments.
7. Penalties for not furnishing accurate information.
8. Use of impartial statistical agency.

6. The Appalachian Coals Case.

The most recent decision indicating the attitude of the Court toward cooperative activity is Apalachian Coals, Inc. v. United States, 288, U. S. 344 (1933). Competing producers of bituminous coal in the so-called Apalachian territory formed a corporation to act as their exclusive selling agent, with authority to determine the prices at which the coal mined by the individual member corporations was to be sold. The producers controlled 73% of the commercial production in the immediate region where they mined, but only 12% of the total

(*) Milton Handler, "The Sugar Institute Case and the Present Status of the Anti-Trust Laws", - Columbia Law Review, - January 1936. p.9

production east of the Mississippi River. The Court refused to enjoin the combination as a violation of the Sherman Act, on the ground that the restraint upon competition was, in the circumstances of the industry, reasonable. The Court emphasized that the question of the application of the statute must be determined by "a close and objective scrutiny of particular conditions". It then described the grave economic conditions with which the industry was beset, because of over-expansion and over-capitalization, diminishing consumption resulting from the use of substitute fuels, organized buying and detrimental market practices. The Court emphasized the fact that the coal produced by members of the combination was sold in competitive markets, and that a vast volume of other coal was actually and potentially available. In view of these conditions it found that the elimination of price competition between members of the corporation did not constitute a violation of the anti-trust laws, saying, significantly, at page 373:

> ".....But the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition..." (underscoring supplied)

The significance of this decision for open price systems is that it indicates a more liberal attitude on the part of the court toward cooperative activities, particularly when the economic circumstances of the industry are taken into account; it is a further application of the rule of reason. However, in the Apalachian decree it was significantly recognized that relaxation of the anti-trust laws in the direction of permitting greater cooperative activity must be accompanied by increased public supervision.

7. Sugar Institute Case

On March 30, 1931 the United States filed a petition in the Western District Court of New York requesting the dissolution and enjoining of the Sugar Institute, and the enjoining of fifteen member refineries and various individual officers from conspiring and violating the anti-trust laws in the sale and distribution of domestic refined sugar. A decision was handed down by Mack, C. J., in United States v. The Sugar Institute, et al, D. C. S. D. N. Y. No. E-59-103, March 7, 1934, in which defendants were enjoined from carrying on illegal activities; but the Institute itself was not ordered to be dissolved because some of its activities were proper and desirable. The decision was appealed to the U. S. Supreme Court by the Institute, was argued in February, 1936, and the appeal is now pending.

The defendants refine practically all the imported raw sugar processed in United States and supply seventy to eighty per cent of the sugar consumed in United States. An elaborate price reporting plan was put into effect by the Institute. Members agreed to sell only at publicly announced prices and terms and not to deviate therefrom without prior notice. Price changes were to be announced not later than three o'clock of the day previous to the effective date of change except to

meet competitors' announced prices. Members first announced prices publicly, then notified the Institute, which reported the information to members and news agencies without comment. The District Court enjoined this plan, upon the basis that reporting of current or future prices and agreeing not to deviate from them until new prices were announced were illegal under the anti-trust laws.

The Institute's practice of collecting and distributing to members statistics on capacities, production, deliveries, stock on hand, etc., was enjoined because the information was not made available to purchasers as well as to industry members. A boycott and blacklist of parties who insisted on functioning both as brokers and warehousemen was found illegal. Agreements among members fixing commissions to be paid to brokers and undertaking not to deal with any broker or warehouseman who did not sign an agreement to abide by Institute rules, were found to be unreasonable restraints. A universal system of delivered prices was found to be maintained by concerted action through the institute and was declared illegal; likewise an agreement for open announcement of freight applications. In addition to the practices noted, the District Court found the following to be illegal under the anti-trust laws and specifically enjoined each of them; prohibition of pooling of shipments by customers; agreement not to use truckers affiliated with warehousemen or brokers; agreement not to absorb switching charges from consignment points; agreement to reduce number of consignment points; agreement to make extra charges on less than carload lots ex-consignment; implied agreement not to enter into contracts calling for delivery more than thirty days ahead; prohibition of quantity discounts; prohibition of "tolling", in which members refined raw sugar owned by non-refiners and retained part of sugar for their services; prohibition of four-payment consignment plans; prohibition of split billing; limitation of and agreed methods of computing cash discounts; implied agreement to abolish price guarantees; prohibition of allowances for used bags or containers; agreement not to sell under private brands; limitations on resales for benefit of buyers; and requirement that members report sales of damaged or frozen stocks to the Institute.

The decree of the District Court was so presented that the Supreme Court will of necessity have to render a separate decision on the legality of each of the practices enjoined by the trial court (*).

F. The Federal Trade Commission Report

A comprehensive report on open price trade associations was made by the Federal Trade Commission in 1929 in response to a resolution by Senator McKellar in 1925. (**) The material contained in this report is invaluable as a background for the present report, both as regards the experience in individual industries and the comparative findings recorded. The summary of conclusions and recommendations have been reviewed here as a focus from which to record the experience disclosed in the present report.

(*) See Chapter II, for a discussion of the significance of this case in relation to the future of cooperative activities, including price filing.

(**) Senate Document No. 226, 70th Congress, 2nd Session.

1. Specific Observations Regarding Information Work of Associations

The report states that the compilation and distribution of trade statistics resembles standardization work, and that it can be most efficiently and economically performed by a trade association or similar organization. That trade and price information as distributed by a trade association can be used to facilitate illegal restraint of trade is considered "no more fundamentally an argument against its compilation and distribution than is the fact that standardization can likewise be misused." (*) In support of this the Commission refers to a familar principle of law; namely, that the purpose, rather than the implement employed, determines the legality of an act. These conclusions have been reiterated and confirmed in previous NRA reports on price filing. They are paraphrased here to distinguish the contribution of the NRA experiment to the knowledge of the economic effects of open price associations.

The following conclusions concerning the distribution of information were made: (**)

1. Information should be given equal publicity whether it records favorable or unfavorable trends, and should be dealt with objectively and truthfully.

2. There is no economic ground for objecting to the compilation and proper publication of general average market prices, provided the average is correct and truthful.

3. Both cost and price reports are legitimate; any undue restraint in connection with them is due to their use rather than their intrinsic nature.

4. The tendency to regard information assembled as for members only is one of the chief objections to the way it is used.

5. Greater uniformity of prices may be properly expected to be the effect of price reporting; seller out of line will tend to get closer to the average.

6. Stability of the price level from month to month may also result, despite changes in costs of production; this is due to the fact that sellers are discouraged from cutting prices by the knowledge that the lower level will be met immediately. This is most prevalent in

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(*) Page 351, Ibid.
(**) Pages 351-366, Ibid.

meet competitors' announced prices. Members first announced prices publicly, then notified the Institute, which reported the information to members and news agencies without comment. The District Court enjoined this plan, upon the basis that reporting of current or future prices and agreeing not to deviate from them until new prices were announced were illegal under the anti-trust laws.

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(*) See Chapter II, for a discussion of the significance of this case in relation to the future of cooperative activities, including price filing.

(**) Senate Document No. 226, 70th Congress, 2nd Session.

Price series compiled by the government and other agencies for various industries, and those obtainable directly from the reports of open-price associations, were used. A comparison between wholesale prices of commodities of industries with open price associations and those of commodities of industries without open price associations also yielded negative results. Prices of open price commodities showed no greater stability than those of other commodities. In fact, they showed a trifle less constancy in their movements from month to month.

The output of members of open-price associations was found to be much less stable than their prices. Recognizing the narrowness of the basis, a comparison between the stability of operation (production, sales, shipments, etc.) of open price industries and industries which used merely trade statistics, indicated that the latter group achieved more stability.

The section closes with the following comment apropos the negative character of the results:

> "A negative result is not a meaningless or unimportant result. In this case it means that open-price work is only one among a multiplicity of causes affecting prices that are at least equally important with it, or else that there are one or two other causes working in a direction similar to it that are of sufficiently dominating importance to swamp its effects. From this point of view, the situation might well call for further consideration from a different angle."(*)

3. Recommendations (**)

The commission recommended that Congress pass legislation requiring all trade associations whose members engaged in interstate commerce to procure a Federal license. Among the conditions proposed for this license was included the proviso that all files, records, accounts, correspondence and other documents of the association be available for inspection of specified Government authorities, and that such associations make such periodic or special reports regarding their organization, business, or practices as may be required by such authorities. Duplicate copies of all statistical reports submitted by members and of all

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(*) Page 358, Ibid.

(**) Pages 366-373, Ibid.

compiled reports issued by the associations to members were to be filed with such authorities. This recommendation was designed to make available to the public more information regarding trade associations and to facilitate the supervision of their activities.

No modifications of the anti-trust laws or none distinctly relevant to open price activity were suggested by the commission, with one minor exception. It was recommended that legislation be enacted clarifying the legal status of the practice of identifying the seller in disseminating prices, and that the preferable solution was to forbid such identification. It stated that:

> "The general purpose of identifying the seller undoubtedly is to enable competitors to verify rumors of prices made on particular contracts, and especially to check up on the 'lying buyer'. Whether that is all that is intended is the critical point. If the information is used in any way to bring pressure upon sellers who are out of line, so as to make them conform to the ideas of the majority of the association, instead of each being allowed to act on his own individual judgment, such purpose and use make the practice illegal. If such employment of the kind of reported data in question is usual and to be expected, the type of report should itself be definitely branded as illegal. The legitimate use it may serve should be provided for in some other way."(*)

The alternative method of verification proposed was for sellers to communicate directly with competitors. This method would be more prompt and to the point, would lessen the possibilities of coercion through an open price system, and could be used for verifying allegations regarding quotations as well as closed prices.

A third recommendation was that a law be enacted empowering the Census Bureau to require monthly reports from individual manufacturers, whether or not they were members of a trade association. This bureau was also to be given the power to publish, in compiled form and without identification of individual operations, the information received.

Finally, the necessity for a certain amount of governmental supervision was discussed in general terms. It was urged that supervision should increase in proportion to the degree of achievement on the part of associations in stabilizing prices and price-

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(*) Page 369, Ibid

making methods. As far as the nature of this supervision is concerned:

> "Administrative supervision of the degree and kind recommended.....is primarily that the word 'supervision' in a strict sense means, namely, comprehensive and adequate observation and knowledge of the facts, with only such elements of control as enlightenment gives. To carry out this conception of supervision, the principal need is authority to obtain full knowledge and to keep the public informed."(*)

4. Pre-NRA Open Price Associations

In Appendix B of the report are listed 101 associations which did open price work at some time or other during the period from 1925 to 1928. Associations were doing such work in the following industries studies in the present report:

asphalt single and roofing
business furniture
candy manufacturing
copper
cordage and twine
electric manufacturing
funeral supply
industrial alcohol
marble quarrying and finishing
metal lath
paper and pulp
salt producing
rubber manufacturing
steel casting
structural clay products
tag manufacturing

G. Trade Practice Conferences of Federal Trade Commission

Proceeding under the voluntary arrangment involved in the Trade Practice Conferences held under the jurisdiction of the Federal Trade Commission, a number of industries have since 1919 set up rules of fair competition as a result of these conferences. An analysis of the rules relative to open price systems which were formulated in these conferences was included in a current report of the NRA Division of Review.(**) This analysis covered the

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(*) P. 373, Ibid.

(**) "Trade-Practice Conference Rules of the Federal Trade Commission (1919-1936); A Classification For Compairson With Trade-Practice Provisions of NRA Codes", S. P. Kaidonovsky, February 29, 1926; (Trade Practice Studies Section, Division of Review).

period from 1919 to 1936 and included the rules of 143 conferences. The rules were classified by the commission into two groups: "Group I" rules are those approved and accepted by the commission as covering unfair methods of competition within the meaning of the Act which are violative of law; "Group II" rules are those accepted by the commission covering practices not contrary to law but condemned by industry opinion as improper standards of business conduct or approved as desirable standards to be followed.

All but one of the provisions dealing with open price systems fell into Group II. A provision requiring independent publication and circularization of price lists by individual members of the industry, was approved for fifty-five industries. Aprovision making terms of sale a definite part of price lists was approved for forty-nine industries. A provision requiring the posting of prices by distributors at point of delivery was approved for two industries. Strict adherence to published prices and terms of sale was recommended in one industry. Deviation from posted prices was condemned in two industries. In a third industry, such deviation was condemned as an unfair trade practice, and included among Group I provisions as contrary to law.

III. THE DEFINITION OF PRICE FILING

A. Pre-NRA Types of Price Filing

Any satisfactory definition of price filing must be derived from description and example of typical plans. It is evident that methods of price reporting used in the past were diverse in character. Those advocated by Eddy for industries engaged in construction or other contract work were described in Section II-B, above. The more elaborate "open competition" plans reviewed in the Supreme Court cases have also been noted.

The formal definition of an open-price trade association used by the Federal Trade Commission in its 1929 report was "one distributing or exchanging price information."(*) The commission listed the following kinds of price information utilized by such associations:

"1. Price lists, whether gross or net, or changes and modifications of price lists.
2. Specific prices on individual transactions, including bids on contracts let.
3. Variation of prices, including frequency distribution and range.
4. Average prices or average "values".
5. Indexes of changes in prices.

(*) See p. 36 Ibid.

6. Aggregate sales in dollars when accompanied by corresponding quantities, if the unit of quantity is tolerably homogeneous."

In Appendix B of its report the commission classified under eleven types the open price associations identified during its investigation. This classification indicates more clearly than any other the diverse forms of price filing in operation during the period preceding the National Industrial Recovery Act. The following different methods of price reporting were recognized:

1. Associations reporting or exchanging bids on contracts (Eddy type).
2. Associations reporting or exchanging all deviations from net price lists previously communicated (Eddy type operated by O. O. Moore, an associate of Eddy).
3. Associations listing individual sales or reporting sales with a high degree of specialization - i.e., by grade, description, origin, destination, etc. - and also indicating those of each member whether by naming the seller or by classification or distinctive marking of the entires (Version of Eddy type).
4. Associations listing individual sales but so handling them that the reports contain no internal evidence of the identity of the sellers.
5. Associations reporting sales with a degree of specialization, i. e., by grade, description, origin, destination, etc., but without evidence of their identity.
6. Associations showing prices in the form of a list of quantities sold at each specific price or of a frequency distribution, or showing the range of prices high and low with some division by commodities or districts.
7. Associations reporting average prices or average values for products that are comparatively homogeneous.
8. Associations reporting quantities sold and corresponding aggregate prices or values for somewhat homogeneous products.
9. Associations whose members exchange price lists through the medium of the organization or receive compiled information referring to such lists or changes in them.
10. Groups of subscribers to the service of some price-reporting bureau.
11. Associations not listed in the above groups that

furnish price-information service utilizing data supplied by members.

This classification should be supplemented by a description of a typical reporting plan in use by several trade associations in 1929 which falls under the second type listed above. This type was distinctly of the Eddy sort, applicable to manufacturing industries and based on the reporting or exchange of net price lists and all deviations from such lists. The plan was used in the Cash Check Manufacturers Industry and was organized by Mr. O. L. Moore.(*) The outline of this plan, prepared by this associate, was as follows:

"1. Each member will file with the secretary a copy of his complete price list, of what are commonly known among the trade as tear-off and punch checks, in force and in effect May 1, 1920, together with discount sheets and any variations and modifications in prices, terms, deliveries, etc., it being the intent of this paragraph that each member shall file not only his current printed list showing maximum and minimum prices but also any discounts or other considerations he may offer directly or indirectly to secure trade, or any discretion he may allow his salesmen as regards departures from the list or as regards inducements to customers to secure trade. And in this connection, each member will state whether or not his company or his salesmen are permitted to distribute any gratuities or gifts for the purpose of influencing trade.

"2. In addition to the foregoing, each member will file from day to day and as soon as made any revisions of his price list, in whole or in part, and any concessions from same that may be made, in prices, discounts, terms, rebates, allowances, inducements of any kind, or by way of quantities, or in the accepting of orders of contracts.

"3. From the foregoing price information, the secretary will compile the following:

"A sheet or report, showing opposite the name of each member (which name may be indicated by number if desired), that member's base price for each of the

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(*) P. 390, Ibid. Mr. Moore was operating similar plans in nine trade associations at the time the Commission report was published.

following styles:***

"This compilation will be mailed to each member contributing his price information.

"Each revision of price list and each concession therefrom will be immediately reported by the secretary to all members that are reporting their price information.

"The secretary will obtain from members advise as to their normal average monthly production (both quantity and value) of flat tear-off and punch checks.

"Each member will report to the secretary monthly on blanks furnished for that purpose information as to the actual quantity and value of his shipments of flat tear-off and punch checks for the current month.

"From the information received from members, the secretary will compile a monthly report showing:

"(a) Quantity and value of shipments reported by all members.

"(b) Percentage of each member's actual quantity and value of shipments to normal.

"No figures regarding a member's actual production are to be disclosed to any other member."

Using a functional basis of classification, the commission divided open price plans into two main types, - the checking type and the market service type.(*) The systematic pooling of price lists either by exchange or central filing, detailed price information, and identification of the seller were deemed the prevalent characteristics of the checking type plan. The basic purpose was the checking of buyers' statements about prices charged by competitors. The market service type often confined the information to average prices, indexes of price movements, or total quantities sold and total dollar values, placing less emphasis on detail and identification of the seller. The basic

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(*) pp. 41-45, Ibid.

purpose was to throw light upon the general price movements in the market.

B. The NRA Type of Price Filing.

The price filing plans established under NRA codes were no more susceptible to precise definition than were their predecessors. However, they were fairly uniform in a number of particulars, and by combining these a hypothetical but nevertheless typical plan can be offered which illustrates the NRA type. The typical plan was mandatory as to establishment and participation by members. It required the filing of prices and all terms and conditions of sale together with any revisions thereof. the code authority was designated as the central agency of administration. Adherence to prices at least as high as those filed was required at all times, but sales above filed prices were frequently permitted. Before revision of prices the plan required either prior announcement or a waiting period. Identified prices were required to be distributed to members. The price filing plan was usually accompanied by some type of no-selling below cost provisions, or limitations on indirect price concessions, or both.(*)

It is evident that the NRA type, when viewed from the perspective of previous mechanisms, represented a very specialized and also a previously quite uncommon plan. The two major characteristics setting it apart from those existing before were the reporting of present or future prices rather than past and closed transactions, and the complete separation of price reporting of trade statistics. Provisions were included in a number of codes for the collection of trade statistics, but they were not integrated with the price filing plan.

The detailed price information provided for by the N. R. A plans suggests that functionally they belong to the "checking" type of plan identified in the Federal Trade Commission report.

Two illustrative code provisions relating to price filing are quoted below. These cannot be described as "typical" in the sense that all of the codes were similar to them; but they do indicate the general manner in which the codes provided for price filing.(**) The first provision quoted is that which was

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(*) See Appendix C. Exhibit II for a tabulation of the frequency with which the various elements of price filing appeared in the 444 price filing plans.

(**) The model code provision, contained in Office Memorandum No.228 which appeared in about ninety of the codes is reproduced in Appendix C, Exhibit V. Other examples may be found in Appendix B for Steel Casting, Appendix A for Asphalt Shingle and Roofing, and Appendix C, Exhibit IV for Folding Paper Box.

in the Ladder Manufacturing Code:

> "Since it has been the general recognized practice of the industry to sell products on the basis of printed price lists with discount sheets distributed to the trade, each member of the industry shall, within ten days of the effective date of this Code, file with the Code Authority price lists and discount sheets, showing his current prices and discounts to the various classes of customers as hereinbefore defined. Revised price lists and discount sheets may be filed from time to time thereafter with the Code Authority by any member of the industry, to become effective upon a date specified by such member of the industry, which date shall not be less than ten days after the filing of such revised prices at the office of the Code Authority. Copies of such revised prices, with notice of the effective date, shall be immediately sent to all known members of the industry, who may file, if they so desire, revisions of their price lists and/or discount sheets, which, if filed not less than five days previous to such effective date, shall take effect upon the date when the revised price list or discount sheet first filed shall go into effect.
>
> "No member of the industry shall sell or exchange any ladders or ladder products at prices lower or discounts greater or on more favorable terms than the schedules of such member on file at the office of the Code Authority as hereinbefore provided.
>
> "The operation of the foregoing provisions shall at all times be subject to the approval of the Administrator."(*)

As an example of those provisions which left more detail to the discretion of the Code Authority, there may be cited the one in the Set Up Paper Box Manufacturing Code:

> "Each member shall, on or before 30 days after the effective date of this code, file with the Code Authority complete schedules in such form, and with respect to such items as the Code Authority may prescribe, of prices, terms, and conditions of sale for domestic consumption (including all differentials, discounts, trade allowances, special charges, and practice regarding samples) of all products offered for sale by such member, and shall so file all subsequent changes

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(*) Codes of Fair Competition, as approved, Government Printing Office, Vol. II, page 627.

therein or revisions thereof at least 24 hours prior to the effective time of any such changes or revisions. The Code Authority shall, upon request, furnish any person concerned, whether or not a member of the Industry, a copy of all such schedules and of all changes and revisions thereof.

"Except in fulfillment of bona fide contracts existing on the effective date of this Code, no member shall sell any products of the Industry for domestic consumption at a price or prices lower than, or upon terms or conditions more favorable than stated in his price schedules then on file provided, however, that discontinued lines or damaged goods or seconds or distress merchandise required to be sold to liquidate a defunct business, may be disposed of in such manner and on such terms and conditions as the Code Authority may approve."(*)

The actual form which the price filing provisions took in the codes varied from simple announcments that prices were to be made public to the most elaborate merchandising plans. The lack of uniformity in NRA price filing plans is attributable to several factors: The varying demands of the sponsoring group, the date of approval of the code in relation to developing NRA policy, and the expansion or modification of the code provision by the Code Authority.

(*) Codes of Fair Competition, as approved, Government Printing Office, Vol. IV, p. 250.

CHAPTER II

STATEMENT OF THE PROBLEM

A study of price filing under N.R.A. codes involves essentially the same problems for initial investigation that are raised by any other trade practice provision - e.g., to examine (1) the nature of the device and its variations, (2) the industry situations to which it was addressed, (3) the ends it was intended to accomplish, (4) the machinery that was devised for its administration, (5) the difficulties encountered in its application and the way these difficulties were resolved, (6) the extent to which the intended purposes were accomplished; as well as any other effects not contemplated, (7) the comparative experience and results under different codes, and under dissimilar circumstances, and (8) the issues of public interest involved in the experience and results disclosed. As a basis for present discussion these have been more broadly classified as the economic, the administrative and the legal problems.

I. THE ECONOMIC PROBLEM

A. Introduction

Although the vocabulary itself was predominantly economic, the discussion, prior to the N.R.A., had revolved chiefly about the legal aspects of the price filing device, and its status in relation to the anti-trust laws as indicated by the decisions in the four Supreme Court cases mentioned in the preceding chapter. Economists in general had given scant attention to the economic implications of price filing apart from the "abuses" that might accompany it, or which might arise from particular structural aspects of the plan, such as the waiting period.

The economic status of the device, and its basic premises, had never been carefully explored. As a result, in addition to differences of opinion concerning the usefulness and desirability of price filing, and its application in particular forms to particular industries, the N.R.A. was faced with a complete lack of unanimity concerning the nature and character of price filing, its objectives and its intended impact on prices and competitive relations.

This was true, of course, to a lesser degree of other price provisions, such as resale price maintenance, loss limitation clauses, and minimum price floors. But such provisions were frankly recognized as "regulatory" or "control" measures, meant to restrict price competition and to confine it within certain defined bounds that could be judged "fair". The initial objectives were clear however much disagreement might exist concerning the need for achieving those objectives in particular industries, the feasibility of the particular device in question, and the ultimate economic results of such regulation.

Price filing has been variously regarded and described as approximating price fixing, or as approximating the ideal of the open market; as tending to control and limit price competition, or conversely, to make competition more effective; as designed to protect sellers against buyers, or, again, to protect buyers against sellers; to lower prices or to raise prices; to accelerate the movement of prices in whichever direction they are headed; or as encouraging or reducing discrimination between buyers.

Examination of the ordinary price filing provisions incorporated in the codes resolves none of these paradoxes. They stipulated only that prices and price changes should be announced. Publicity was required as the initial objective--an end in itself. The expected or intended effects of such publicity on competitive relations or on prices were not stated.

That there was no general agreement on what those effects might or should be is clearly evident from the expressed desires of code proponents in submitting price filing provisions, and from the controversial and involved discussions that preceded and accompanied the slow development of N.R.A. policy concerning price filing. (*)

One obvious part of the problem of price filing, therefore, is to reconcile, or at least to explain, the diverse concepts about price filing and its functions, and to try to integrate them into a coherent statement of the economic role of price filing and its potential usefulness as a device for modifying or regulation competition.

The NIRB attempted just such an integration of view on prices filing in the statement of Administrative Policy, issued April 23, 1935. (**) This was written in the light of the accumulated experience with price filing under the codes, and undertook to translate that experience into a clear statement of the nature and objectives of price filing, as accepted by the Administration, and to set forth specific policy criteria for the form and contents of open price provisions, and the proper field for their application in codes. It was prepared and issued as a working guide for the anticipated revision of existing price filing provisions and hence can not be taken as a complete or well-rounded discussion of the underlying economic concepts. But it is by far the most explicit statement available of the NRA administration view of the purposes of price filing and the economic function it was expected to perform. Excerpts of the statement, as included in the

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(*) The various statements of purposes and the intended objectives of price publicity by industry members are discussed on p. 79 Chapter III. The chronological development of NRA policy and a discussion of its effects on code operations is contained in Chapter VI.

(**) These views, of course, were those of various administrative officials and did not necessarily include those of industry members. See Appendix C Ex. V. for text of this statement.

Summary of Policy Statements issued in May, 1935, are for that reason reproduced here to permit a closer examination of the ideas expressed. (*)

The statement begins with the assertion that "open price filing is a mere device", whose

> "potentialities for benefit or mischief depend upon the purpose to which it is put and the methods which attend its use. The standard by which it should be judged is price making similar to that afforded by an open and competitive market, such as an organized commodity exchange."

> "The ideal of an open and competitive market can seldom be fully attained. It is hoped to approximate its objectives by open price filing under appropriate circumstances. It is possible for the open file to allow buyers and sellers to accomodate their activities to competitive conditions, to fix limits on the spread of quotations at any given time, and to tend to make price perform its industrial function. Open price filing should, so far as possible be made to furnish a public record of price movements, provide a check on discrimination among customers, give the small enterprise information about the activities of his larger competitors, reduce the amount of deception among buyers and sellers, give the parties concerned a fuller knowledge of conditions affecting the market, and promote and safeguard the integrity of the process of competitive price making." (**)

The broad range of economic ideas touched upon by these paragraphs suggests the need of a protracted excursion into the theories of competition, the industrial function of price, and the intricacies of price-making as a prelude to our study of price filing experience under the NRA. The necessity of just such a basic analysis was urged by several economists who were asked in February, 1934, by Leon Henderson, to make suggestions concerning the proper scope and direction of a special study of open price associations to be conducted by the NRA prior to the Code Authority conferences of March, 1934.

Two authorities were particularly insistent upon the need for linking any study of price filing with a broader analysis of the entire

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(*) The statement was necessarily a compromise of the opinions of those individuals participating in its preparation, and may in certain respects balance administrative judgment against final economic judgment.

(**) Summary of Policy Statements, compiled May 1935, by Alvin Brown. Items 1710, 1711, p. 49.

pricing system and with the underlying economic philosophies of price regulation, either under private or government auspices. (*)

(*) Leverett S. Lyon, executive vice-president of the Brookings Institution, later Deputy Assistant Administrator of Policy in the NRA, wrote as follows in February 1934:

> "It will be impossible", he said, "to arrive at a really satisfactory decision on open prices unless the data which are disclosed by an investigation are related to a clear understanding of the function of prices in our economic organization. Open prices are but one phase of a price structure. The open price association is but one method of price announcement. Any judgment as to whether open price plans are desirable and in what form, if at all, must be related to more general thought on prices. It will be of primary significance, therefore- indeed, it will be essential to a satisfactory analysis of this problem - to proceed with a thorough understanding of the role of prices in an economic system... It will be necessary for a satisfactory analysis of this problem to determine whether prices are to be considered in relation to an economic system of private enterprise, private ownership, and competition (that is, essentially the capitalistic system) or whether they are to be considered in relation to a plan which embodies increased elements of governmental ownership or governmental price fixing, cartelization, or some other form of economic order more socialistic than that to which we have been accustomed. The role which can be assigned to prices, the effects which can be achieved by them, differ according to the system in which they operate...."(*)

(*) Excerpt of letter contained in N.R.A. Press Release No. 3473, February 26, 1934.

Myron W. Watkins, Professor of Economics at New York University, and author of several books on trade association activities, regulation of competitive practices and anti-trust legislation, also urged the need of a basic analysis of the competitive structure before any attempt was made to examine and evaluate the factual experience of NRA with price filing provisions.

> "The first problem for consideration in a study of price policies under the codes seems to me to be that of determining what method of price regulation the Administration has in view... The futility of proceeding upon a concrete, detailed study of pricing provisions in the Codes or upon a factual investigation of how those provisions have worked out in practice, without first disposing of this basic issue, if not finally, at least tentatively, should be apparent. Not one of the most common types of price provisions found in the Codes can be said to be either good or bad per se. Not even the essential provision of all open price arrangements; the obligatory filing at some common point of the price terms upon which alone each of the

various enterprises in an industry is prepared to accept orders, can be said of itself either to promote or to obstruct the establishment of fair prices. It all depends upon how one is endeavoring to insure fair prices, in the first place, which in turn depends, or should depend, upon what one conceives fair prices to be. That, finally, is a question of ethics; the nature of the interests or values which one regards as deserving of paramount consideration....."(*)

In lieu of the critical analysis of alternative economic philosophies suggested by these writers, it will be assumed that the intention of NRA was (as clearly indicated by the statement on price filing quoted above) to restore and make effective free and open competition so far as possible under modern conditions of economic enterprise.

Even so it seems necessary to define just what is meant by "free and open" competition as used here and to undertake an analysis of the inherent possibilities and limitations of price filing as a means of attaining such "free" and "open" competition (**) before a description and evaluation of the experience with price filing plans under NRA codes is undertaken.

The need for such an analysis exists quite apart from the announced objectives of a particular administrative organization such as the NRA. It is apparent even in the original thesis of Mr. Eddy--that knowledge of marked conditions is essential to true competition; hence the supplying of that knowledge in the form of publicity (primarily of prices and price offers) will contribute a wholesale regime of fair competition based on knowledge rather than on ignorance and secrecy.

One writer, Milton Nels Nelson, has assumed that Mr. Eddy believed his conception of knowledge, as an essential to competition, was an original contribution ot economic thought, when in fact it was merely a reinteration of a well-known concept of classical economy. (***) Mr. Nelson points out that economists, in formulating the law of "perfect" competition, based upon demand and supply relationships, have predicated it upon the assumption that buyers and sellers have enough knowledge of market factors to be conscious of their own interests as bargainers and have the desire and enough freedom of action to pursue those interests intelligently. He then proceeds to criticize Mr. Eddy's theory of open prices on the grounds that it leaves out of consideration the buying class, and hence is utterly inadequate as a solution to the problem of achieving true or "perfect" competition. So long as "knowledge" is to be supplied only to sellers and is withheld from buyers, it can not contribute to any nearer approach to ideal competitive conditions and will serve only "to give redress to one industrial class, namely sellers ....."(****)

(*) Ibid.

(**) See below, pp. 62-4 for historical significance of the "free" and "open" market.

(***) Nelson, op. cit., p. 196.

(****) See, also, Fetter, F. A., The Masquerade of Monopoly, pp., 262-263, (1931), New York

This criticism is obviously pertinent and was clearly, although somewhat belatedly, recognized by the NRA, which sought in later policy declarations to insure price publicity to customers as well as sellers. But there are other equally pertinent observations that could be made concerning Mr. Eddy's theory if it is to be analyzed in terms of the theory of "perfect" competition referred to by Mr. Nelson.

B. The Meaning of Publicity in Perfect Competition.

"Perfect competition" has, during the past 150 years, been a common field of speculation by those economists who are now often labelled the "pure theorists." Starting with certain assumptions about human nature and individual liberty, equality, and property, that writers were concerned with demonstrating by a process of logic the manner in which commodity values were determined and income distributed in wages, interest, and profit. The assumptions, frequently not explicit or well articulated, were the assumptions of perfect competition. The deduction of the reasoning process was that perfect competition, more surely than any other organization of economic activity and resources, would maximize the wealth of the nation and most justly distribute this wealth.

The "end" of perfect competition has been variously expressed as maximizing the national income or individual utilities; securing to each the product of his efforts; rewarding enterprise in proportion to its efficiency; distributing resources among different places and occupations in such a way as to raise the national income to a maximum position; and the minimizing of prices to a level which pays for expense and trouble of production--which in turn, therefore, forces the greatest efficiency and highest quality. The maintenance of an equilibrium between various industries and lines of economic activity such as to make impossible general or overall depression was another beneficial result sometimes pointed out.

Among other things, it was demonstrated that in any industry under perfect competition prices are uniform (differing only by amount of varying delivery costs) and are just sufficient to return to the most inefficient producer his costs of production.

It is entirely clear that the assumptions of a perfect competitive system have never been identical with the realities of economic behavior. This is true, it may be noted, if for no other reason than that the assumptions of perfect knowledge and perfect mobility of resources from one industry to another eliminate the essential fact of timeliness-first by eliminating the uncertainties of the future and, second, by supposing that movement is static. (*) The historical meaning of the

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(*) In a perfectly competitive market deviations from equilibrium price could not occur. "there would be neither movement towards an equilibrium nor oscillations about it." It (the equilibrium price) [illegible] "would" coexist with the market through the realization of stability at a single stroke the market comes into existence." Chamberlain, Edward, Theory of Monopolistic Competition, p. 26 (1933) Harvard University Press.
Neo-classical economists, particularly Alfred Marshall (see his Principles, 8th ed., pp.330-379) have introduced timeliness through the conceptual device of short and long periods, concluding that the shorter the period of time the greater must be the share of attention to demand; and the longer the period the more important will be the influence of cost production. This device

concept of "Perfect competition" lies not in its use as a scientific explanation of economic behaviour but rather in its meaning as a social desideratum, an "ethical ideal-type", a criterion for the control of economic behavior. (*) Frankly recognized as such, "perfect competition" is a useful concept--not because it is strictly attainable but because, within the limitations imposed by human nature, it may be possible to approach more nearly than before this widely accepted standard for control of economic rivalry and bargaining in a system of private enterprise and capitalism. (**)

Cont'd.

while recognizing that mobility and production are time consuming, contains an important element of static analysis in that it carries an assumption of constancy in the individual's reactions to a changing social and economic environment, McMillan & Company, New York.

(*) Except as it may have been employed for "pedagogic illustration" - See Commons, John R., Institutional Economics, pp. 724-728 (1934); also his discussion of "ethical ideal-types", ibid., pp. 741-748. McMillan & Company, New York.

(**) Cp., ibid, pp. 342-348 and 711. The present report has in large part been oriented to this end of public policy--not because the authors necessarily prefer it to other possible ends-- but because it makes explicit a goal of regulation which appears to be the most widely accepted and one which legislators, courts, and the National Industrial Recovery Board appear to have in mind when they refer to "promoting competition", "eliminating monopolistic practices", the "ideal of an open and competitive market", "competitive price making", etc. It may be called and end of "fair competition" in the sense that it represents that balancing and conflicting interests which is most widely accepted as just and fair. This does not mean; however, that the reader will not find in this report evidence bearing on the relation of price filing to other specific goals of public policy (which may or may not be compatible with the standard of perfect competition). For example, scattered through the report may be found material bearing on the incidence of price filing on the small business man; on the function of price filing in reducing the social "illth" of secrecy and suspicion; or the social costs of bargaining and negotiating over a price.

In order to indicate the meaning of publicity in relation to perfect competition, it is necessary briefly to summarize the essential elements or attributes of this competition. They may be called: purity (from monopolistic elements); mobility (and fluidity of resources); and rationality and knowledge. (*)

1- Purity. "Monopoly ordinarily means control over supply," and therefore over price. A sole prerequisite to pure competition is indicated--that no one have any degree of such control." (**) First, the number of sellers and of buyers must be large enough that the influence of any one of them on the total supply or demand, and hence on price, is entirely negligible; or if not entirely so, too slight to make it worth while for him to exercise it. A second requirement is that the commodity itself must be perfectly homogeneous or standardized and appear in the same market; otherwise the seller of a "different" product would possess some degree of control over the price of his particular species of product. Moreover, the seller must be perfectly standardized. "Anything that makes buyers prefer one seller to another, be it personality, reputation, convenient location, or the tone of the shop, differentiates the thing purchased to that degree, for what is bought is really a bundle of utilities, of which these are a part." (***)

Finally, it should be pointed out that implicit in pure competition is the assumption of accessibility or of equality of opportunity--that sellers and buyers have an equal opportunity to enter and participate in a market. The possible obstacles are many but may in the main be classified as follows:

(1) Discrimination by which is meant a difference in price between customers which does not reflect the difference in the cost of producing for and selling to them or the value of services rendered the seller by these customers.

(2) Predatory competition which is the use of sellers (or buyers) of superior resources to handicap or ruin weaker competitors or to prevent entirely a potential competitor from entering a market.

2- Mobility of resources. A second element of perfect competition is perfect mobility of resources to those industries which are making a greater return on investment than is enjoyed elsewhere, and similarly away from those industries in which the rate of return is depressed below the level found elsewhere. Under such circumstances the net revenue of all industries will be identical, and variations will not occur even momentarily. The forces of supply and demand guided by.

(*) Other assumptions which need not be discussed here include the absence of fraud and violence and the negotiability of commodities and debts--see Commons, op. cit, pp. 338-339, 775-776.

(**) Chamberlain, op. cit., p. 7

(***) Ibid, page 8

desire for profit and through the medium of mobility effect a perfect equilibrium between industries, and society is supplied with the goods it most desires at prices devoid of elements other than necessary costs of production.

This assumes that capital is fluid or will move in precisely the amount necessary to equalize the revenue of the attracting industry with that of others, whether the amount be one dollar or one million dollars. It assumes, moreover, that there will be no hesitation or loss involved in abandoning productive equipment which for the moment is failing to yeild a return equivalent to that which is enjoyed in other places. Finally, as pointed out above, it contains the contradictory assumption that movement is static or without element of time. It has meaning only as an ideal which might be approached but never attained.

3 - Rationality and knowledge. There is assumed finally an "economic man" who acts with perfect reason in the direction of his best pecuniary interest and whose knowledge of opportunities--all of which lie in the future--is complete. Here again time has been left out of the picture and again that which is presented is an ideal.

Applied more specifically to the market this implied that all buyers know of the offers of all sellers and likewise sellers are aware of the prices which each of the individual buyers is willing to pay. The opportunities and freedom for trading or for moving to other markets are complete because they are all known.

Where this knowledge exists sellers have no interest in the prices obtained by competitors inasmuch as such implies that they have an interest in maintaining or cutting prices, which is incompatible with the assumptions of the purity of competition (*), viz., that the number of sellers is sufficiently large so that no one can exercise any control over supply and hence over price.

It is this element of knowledge which is the specific concern of this report. Publicity of price offers is one method of promoting knowledge of market conditions; and mandatory filing is a device for effecting publicity of price offers. From this it might be reasoned that because price filing expands the fund of knowledge it ex hypothesi contributes to a fuller realization of the ideal of perfect competition. This reasoning has been widely embraced, even by critics of open price filing, who have directed their opposition to the mechanics of price publicity and its surrounding circumstances rather than to the publicity itself.

Such a deduction involves the technique of static analysis, i.e., holding other factors constant except the one being considered and investigated. These writers, however, fail to make explicit the nature of the assumptions of constant factors. Specifically, they have assumed that the other elements of perfect competition are present and

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(*) Above, p. 44.

have ignoried completely the nature of other "imperfections" that may exist in a given market.

If these imperfections are forces tending away from the true competitive price and are active in character, there remains the possibility that price publicity will enhance rather than counteract their effects. Thus to give equal knowledge of prices when there is unequal influence or power to act on that knowledge might conceivably result in a price further from the perfect competitive price rather than closer to it. This possibility will be explored in the next section.

C. The Role of Publicity in Imperfect Competition

Modern industry, with its concentration of production in large units, the aggregation of tremendous capital assets under corporate control, and extreme product differentiation backed by huge advertising outlays and other indirect forms of selling competition has so hastened the trend away from conditions of "perfect competition" that the assumptions of this theory have little in common with the facts of the present business world. Every market is to a greater or less extent "imperfect." Each producer is obligated to choose not only the amount he will produce, but also a price or prices at which he will offer or sell his product at any time. Always he must choose that price with regard to the amount and kind of goods others are producing and the prices they are quoting, since the pricing and production fabrics of competitors can seriously affect his own volume of sales and profits. (*)

(*) As Professor Chamberlain, in introducing his theory of "Monopolistic Competition", states:

> "Because most prices involve monopoly elements, it is monopolistic competition that most people think of in connection with the simple word "competition". In fact, it may almost be said that under pure competition the buyers and sellers do not really compete in the sense in which the word is currently used. One never hears of 'competition' in connection with great markets, and the phrases 'price cutting', 'underselling', 'unfair competition', 'meeting competition', 'securing a market', etc. are unknown. No wonder the principles of such a market seem so unreal when applied to the 'business' world where these terms have meaning. They are based on the supposition that each seller accepts the market price and can dispose of his entire supply without materially affecting it. Thus, there is no problem of choosing a price policy, no problem of adapting the product more exactly to the buyers (real or fancied) wants, no problem of advertising in order to change their wants. The theory of pure competition could hardly be expected to fit facts so far different from its assumptions." See Chamberlain, op. cit., p. 10 Cp., Robinson, Joan, The Economics of Imperfect Competition, pp. 88-90 (1933).

An attempt will be made in what follows to indicate in summary manner the possibilities offered by publicity through price filing and dissemination for strengthening a tendancy away from perfect competition or, on the other hand, for contributing to a greater attainment of this end. Taking monopolistic or "impure" competition as a point of departure the approach will be to suggest, first, conditions under which publicity of prices (*) may accentuate monopolistic price formation; and, second, circumstances under which it may promote or prevent access to the market. (**)

(*) By sellers. No attempt will be made to discuss the economic implication of a possible system of publicity of buyers' prices.

(**) The bearing of price publicity of the type provided for under NRA codes upon a third attribute of perfect competition, viz., mobility of resources (see above, pages 44-45) is too indirect and remote to justify discussion in this report.

1. Price Publicity and Monopolistic Price Formation

By reason of the fact that under monopolistic or "impure" competition every seller has some degree of control over supply, the starting point of a theory of monopolistic competition is not pure competition but pure monopoly. Price under pure monopoly is a calculated, managed price set at a figure which will maximize the monopolist's total revenue; "he is able to maintain it there because ex hypothesi there is no one to cut under him. .... it represents a balance of opposing forces of loss and gain, which renders the total profit a maximum." (*)

The monopolist in setting his optimum price must consider two things: one, the volume of sales that he may expect at any given price--which is a consideration of the competition of substitute goods and of elasticity of the demand for his product; and, two, the costs of producing the goods which he can sell at any price which he settles upon.

If, however, there are competitors producing the same product (**) he may, in fixing upon a price which will maximize his total net revenue, take account not only of the elasticity of demand of the product and his own production costs but also of the policies which these rivals are likely to follow as a consequence of his own actions.

"If each competitor assumes his rival's price will not be changed, he can, by setting his own slightly lower command the market and dispose of his entire output, increasing his profits virtually in proportion to the increase in his sales. His rival making the same assumption will cut still lower, and the downward movement will continue..... until no further price change can be made without disadvantage to someone, the equilibrium price... (being) the purely competitive one for only two sellers, and, of course, for any greater number. If the full power of the seller to alter his price, even to the disadvantage of the buyer, is recognized, however, price will oscillate over an area which becomes no narrower and approaches more closely the purely competitive figure as the number of sellers becomes large....."(***)

(*) Chamberlain, op. cit., pp. 12-13.

(**) Few enough, however, as to give each of them some control over supply and hence over price.

(***) Chamberlain, op. cit., pp. 36 and 54. For his demonstration see pages 34-46.

A much more realistic hypothesis, however, is that the seller will recognize in determining his own policy that his rivals' policies will be determined at least in part by his own. For example, before making a price cut to increase his share of the market, he will probably consider whether such a reduction will be met by his rivals and thus prevent the accrual of any profit to himself. To render his profit a maximum, the seller will take into account "his total influence upon price, indirect as well as direct." As long as each seller looks to his ultimate interest and knows that interest, prices will be determined at a level which will maximize the total profits of all--the level which would maintain if there were a single seller controlling the entire supply. "If sellers have regard for their total influence upon price, the price will be a monopoly one." (*) It is this action which hereinbelow will be called "monopolistic price formation."

Before proceding with this consideration, it is necessary to point out that the discussion of price formation which has immediately preceded has proceded upon the assumption that the product and sellers competing for a given market were perfectly standardized. Circumstances are much different: Either because a seller's product is different functionally or in quality, in appearance or style, or because he possesses a legally protected trade mark or trade name, or because of his personality, race, color, or character of establishment, it may be said that each seller enjoys some degree of monopoly. Yet, even under "absolute" monopoly there is not an entire absence of competition since there are always substitute goods--however imperfect. The degree of competition between differentiated products is an obvious function of the extent of the differentiation.

> "A price cut by one automobile manufacturer, for instance, affects especially the sales of those other manufacturers whose product is in approximately the same price class, and probably causes much less disturbance outside of these bounds..... Evidently, a (competitive) group may be large or small, depending upon the degree of generality given to the classification.. Characteristically, any individual seller is in close competition with no more than a few out of the group, and he may seek to avoid price competition for the very reason given as applying to small members--that his cut will force those in closest competition with him to follow suit." (**)

Competition is not limited to price. Product differentiation is a competitive device. The quality of the product may be improved or deteriorated, its appearance changed, or a myriad of

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(*) Ibid, p. 54; see also pp. 46-51.

(**) Ibid., pp. 102-103.

additional services and extras added. What is more, it may be of advantage to expend funds in advertising and other forms of sales promotion in an effort to build up customer goodwill.

Theoretically, if each seller were fully advised of the prospective price, product, and advertising policies of his competitors, price, just as in the case of the standardized product, would be a monopoly one and product differentiation and advertising would be at the level and of the kind which would obtain under pure monopoly where they represent devices employed to attract the consumers' dollar from substitute products. (*) But the problem of knowing the probable competitive policies of rivals becomes infinitely more complex with three variables to consider instead of the single one of price; and publicity of price offers as a means of promoting this knowledge is manifestly of much less potential significance.

Proceeding to the problem--the bearing of publicity of price offers through price filing on the conditions of monopolistic price formation-- there are three factors for consideration:

(a) The farsightedness and unanimity of rival sellers in acting in the direction of their ultimate best interests;

(b) The extent of the price and other data available, first, to rival sellers and, second, to buyers; and

(c) The interval before information becomes available to sellers and to buyers. (**)

a - The farsightedness of rival sellers. It has been seen above that the degree of monopolistic price formation in any market depends upon whether sellers take into consideration their "indirect" as well as "direct" influence upon price. Where competitors independently determine upon and adhere to that single price which will maximize the total net return of the industry they will have had regard for their total influence, upon price--direct and indirect--and price will be the monopoly one. Under such circumstances price changes would be dictated only by such considerations as fluctuating costs and changing prices of substitute products--the factors which the pure monopolist looks to in determining his prices. These price changes would be effected simultaneously and in the same magnitude by the independent movement of competitors.

(*) Ibid., pp. 100-104, 170-171. It should not be assumed that prices under monopolistic competition will always be at a level above costs. It is true, however, that costs will usually be higher and production less than under pure competition. Ibid. pp. 175-176.

(**) Cp. Chamberlain, op. cit., p.51-53. Since he does not mention it specifically, evidently Chamberlain minimizes the practical importance of the second factor as a condition to monopolistic price formation.

This, however, assumes a degree of farsightedness which probably is not approximated in any of the contemporary markets. It means that each rival is aware of the ultimate consequences of competitive price cutting and will not, therefore, initiate any downward movement from the monopoly price. This condition of joint interest will be violated when the individual rivals see no further than their presumed immediate advantage of cutting under their competitors' prices to enlarge thereby their share of the available market. However, even though the individual seller were fully aware of the ultimate results of such competitive price cutting--that the immediate advantages to be derived will largely cancel out through competitive price meeting and prices will work downward until they reach the purely competitive level where there are no monopoly gains--he may nevertheless act contrary to his own best interest in maintaining his own price if he is uncertain about whether his competitors are likewise aware of the results of their price cutting. If there is a strong presumption that these competitors have regard only for their immediate interests it would be foolish for him to proceed deliberately by maintaining his own price. (*)

Monopolistic price formation then as one significant factor depends upon the extent to which business rivals are mutually confident that each is aware that immediate gains from price cutting may not be realized because price reductions will be met and that each is likewise aware that such competitive price cutting will in any case eventually lower prices to a level which will only sufficiently cover costs to justify remaining in business. The degree of such awareness or farsightedness existing in business is largely indeterminant. It depends upon a number of factors which themselves are not determinant--inasmuch as it raises essentially the question of individual behavior in highly varied and changing environments. The number of sellers in any market may be so many as never to raise the question in the mind of any one that his policy may so affect the market of his rivals that they will promptly meet or follow the price which he sets. Or where product differentiation and advertising are important competitive devices the seller may have no reason to assume that a price reduction on his part will be met by price cuts from competitors rather than by more energy devoted to dressing up attractively their products or to persuading the consumer of their particular merits. Or, again, individual sellers may interpret the general market situation--and so their long-run interest--quite differently some feeling, for example, that it is best to unload their entire goods on hand whatever the immediate cost, whereas others feel and act in directly the opposite manner. Or, price cutting on the part of some may be interpreted to be designed to open up a new market or secure large or special contracts of another character to which the others may be, in one instance, entirely indifferent or, in another instance, willing to enter into

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(*) See Ibid., pages 51-53 for discussion of this factor of uncertainty.

competition at whatever the possible immediate sacrifice.

It is probably true in any case that business rivals are not conscious of the ultimate implications of competitive pricing except through long and difficult experience. A lesson once learned may be entirely forgotten because of the appearance of new and inexperienced members or because of major industry upheavals brought about by factors outside of the industry's control. In the course of repeated experiences they may have learned that in the long run they are best off and most secure by following the leadership of some concern in whose judgment of market factors they have confidence or for whose power for damaging retaliatory action they have respect. The influence of the leader in monopolistic pricing is of particular significance, it may be noted, where price increases are in question: A concern, attempting to lead in a price increase, which commands little respect or has little power may fail in its purpose entirely because of the immediate gain at its expense which rivals see in keeping their price at prevailing levels. In the absence of an influential leader or in the absence of collusion or agreement price increases may be made with great difficulty in an imperfect market.

It is difficult to see wherein a system of price publicity through price filing can in itself contribute to improving the "farsightedness" of business rivals in looking at the ultimately unfortunate consequences to them of competitive price-cutting--except through expanding the contacts and influence of the more enlightened members; or, more probably, in contributing to the experience of following a leader whose pricing policies are more precisely or extensively publicized or who in turn become more fully aware of and hence better able to act against those who were unwilling to follow.

It is probable, however, that much the more potentially important contributions of price filing to monopoly pricing may come from two other factors referred to above, i.e., (1) by increasing the knowledge of competitors' prices and (2) by reducing the interval or time lag before these prices became known. The possible bearing of price filing on these factors will be discussed in the two sections which immediately follow.

Before proceeding, however, it must be strongly cautioned that however great may be the contribution of price filing to fully and promptly to apprising sellers of their rival's price policies it will not follow that monopolistic price formation will thereby necessarily be promoted. To the extent that "farsightedness", viz., the extent to which business men in forming their own price policies are aware of and consider possible reactions or prices which rivals will make as a consequence of their own, is not itself promoted by price filing, the result may be to intensify competitive price cutting, inasmuch as competitors in their eagerness for gain will know more precisely what prices to undercut; or if competitors in another industry were already possessed with some degree of farsightedness the result may, on the other hand, be a very definite tendency towards monopolistic pricing because of the appreciation that price reduction now openly publicized will be promptly met.

The indeterminateness of the problem makes it particularly important to ascertain in what proponents conceived to be the functions of price publicity; whether for example they looked upon it as a possible preventive of competitive price cutting or as an aid to price stability; or whether they minimized the publicity aspect and sought through price policy plans a means to a more direct control over prices.

b - Extent of the price and other data made available.

Economists in their writings almost universally have treated price as a single datum (*)--a misconception which perhaps has been encouraged by the prevalence of index numbers of simple price series. It is of doubtful propriety to speak simply of "price" in the case of any manufacturing industry today; what exists and what the business man faces in determining his own policy is for a single concern and a single product a complicated "going" price structure which may be a composite of so many distinct and flexible elements that even the abstraction of a net price has little meaning, and the list price is nothing more than a point of departure and of the various elements perhaps the least representative. (**)

(*) Or at the most what seems to be a list price to the wholesale or retail trade with a few discounts that are handled merely as simple constant adjustments to be applied to list prices throughout the given period of time.

(**) As an example of the price structure of a modern industry, the structure for the "standard" companies in the original filing by the Fractional Horse Power Motor Group of the Electrical Manufacturing Industry under the code involved the following:

1. Customer classifications and the discounts to these classes.
2. Terms of sale.
3. Delivery policy.
4. Definition of the customer classifications.
5. "Multipliers" for certain individual purchasers within given customer classifications.
6. Quantity discounts to all classes for unit shipment of 10 or more motors.
7. Discount plan for Class "G" purchasers (resale machinery manufacturers) based on quantity and shipping requirements.
8. Motor prices (general purpose and special application motor prices are both subject to discounts).
9. Electrical modifications
10. Mechanical modifications.
11. Motor dimensions.

What has given rise to this ubiquitous method of indirect pricing has never been systematically explored (*) although the suggestion may be made that it reflects in part the deliberate confusion by business rivals to conceal from one another the true nature of their price concessions. This concealment may have arisen, however, not only as a device to reduce price without the knowledge of competitors but also of buyers. A reduction to particular buyers or classes of buyers is possible even where the seller does not wish to go as far as to reduce prices to all buyers--if the actual price can be concealed by such devices as rebates and special allowances.

A second explanation of the prevalence of indirect pricing may be the fact that buyers vary so greatly in circumstance that it is more strategic, convenient or more economical to employ a price structure flexible enough to allow for these variations. Obvious cases in point are discounts for cash payments and for quantity purchases and allowances for advertising performed by buyers. Or as has been frequently pointed out, the nominal price may become customized and leave to the indirect elements the function of providing flexibility. A customary price may be established because the product is repeatedly purchased, as in the case of chewing gum, or through nation-wide advertising as in the case of cigarettes. Such devices or premiums and free deals often accompany the sale of this kind of product.

The variety of indirect price elements and other means of promoting a sale is well illustrated by the types of restrictions imposed in NRA codes. Among general types of codal restrictions (usually applying irrespective of class or location of buyer) were those primarily relating to (1) time of buyer's payment (**); (2) risks of buyers (***); (3) giving of additional goods or services (****);

(*) See, however, Lyon, Leverett, S., Brookings Institution, Free Deals (1933) and Avertising Allowances (1932)

(**) E.g., cash discounts, periods of free credit, interest beyond free credit period, datings, terms of installment selling, and deferred payment, anticipation of bills, etc.

(***) E.g., product guarantees, maintenance guarantees, allowances on defective goods or discontinued lines, price guarantees, resale guarantees, approval selling, consignment selling, offers without time limit, assuming liability for non-performance caused by non-controllable factors or for error in plans or patent infringements, agreements indefinite as to time and quantity, etc.

(****) E.g., free deals, premiums, coupons, samples, prices, sales promotion awards, special containers, display materials, demonstrating, estimating, inspecting, crating or packing, warehousing and storing, etc.

(4) giving favors or financial assistance to buyers (*); (5) payment or diversion of commissions or fees to customer (**); (6) allowances for payments or value rendered by buyer (***).

More intrinsically secret devices by which concessions may be granted are illustrated by the following devices which were often prohibited or restricted by NRA codes. (****)

Thus the seller in promoting his sales is by no means confined to reducing a hypothetical single-unit price. He may liberalize his terms of payment, make greater allowances, assume a greater share of the buyers' risks, "throw in" additional or supplementary goods or services; or, if he anticipates that his action would be nullified through being promptly met by competitors who have ways of finding out about it, he still may resort to an understanding with the buyer whereby the latter may avoid full performance with the terms of the formal agreement or contract; or he may conspire with the buyer to falsify the terms of the agreement; or he may make no formal or written agreement. Publicity, if to be completely effective, implies, however, that every element of price and every understanding with the buyer be known.

But, as pointed out above, the seller who does not wish to make the extensive price reduction which would be effective if granted to all of his customers, may confine it to single buyers or groups of buyers. Pricing devices such as quantity and volume discounts, variation in trade differentials, diversion of brokers' fees and particularly any kind of rebate are directly and appropriately adapted to the purpose as is the creation or "splitting off" of a new classification of customers to whom it is desired to grant a favorable price.

(*) E.g., entertainment, gifts, paying buyers' personal expenses, subsidizing, etc.

(**) E.g., splitting of commissions, fee splitting, payment of brokerage to other than bona fide broker, etc.

(***) E.g., for trade-ins, labels, advertising, containers, installations, space hired, cartage, etc.

(****) E.g., departing from credit terms of contract, settlement of old accounts at less than full value, permitting buyers' cancellation, retroactive settlements or adjustments, etc.

Accepting in payment: Securities, real or personal property, buyers' capital stock, etc.

Oral agreements, offers, orders, false billing, offers, orders; misdated invoices, contracts, orders, offers; invoices, orders or offers omitting terms of sale, or specifications; split billing, lump sum offers, etc.

The above examples should sufficiently indicate the number and variety of the opportunities available to the business man to effect concessions by means other than direct or nominal price reduction. The immediate task is to examine the problems which face systematic price publicity in bringing to light not only the nominal price changes and changes in other fairly obvious price elements but all of the various and devious devices that may be employed toward the same end.

In the first place, the data must be filed in such a manner as to be informative and readily intelligible to competitors. The very nature of certain terms of sale may make this difficult. Terms of payment which vary according to the risks represented by different buyers, allowances for services rendered by various customers, the assumption of liability for defective product through product guarantees or through a policy of accepting or allowing for the return of merchandise, the assumptions, through guarantees against price advances or declines, of the customer's risk of changing price levels—these are examples of terms the exact magnitude of which may vary from buyer to buyer or which cannot be determined precisely in advance of the sales agreement. In filing, an industry member granting this kind of selling term may necessarily be limited to a general statement that he e.g., will guarantee products against defects in material or workmanship or will guarantee against price decline; or he may e.g., file only the most favorable credit terms which he will grant or the most liberal advertising or trade-in allowances which he will make. In both cases the competitor lacks the information with which to ascertain precisely the actual price terms which will close the transaction.

A more serious obstacle is the reluctance of the industry member to file his pricing policies in an intelligible manner. When they are complex and varied he may deliberately confuse them or he may consider it too hindersome to order them in a manner necessary to make them easy to comprehend and strictly accurate. This is, however, but a part of a broader consideration of the willingness of the industry member to adhere to his filed prices and terms. Whenever there is a prospect of immediate advantage through price reduction there will be a drive for indirect and secret pricing. This urge may be intensified by systematic price filing and dissemination due to the fact that the knowledge of competitors' price offers obtained from the filing agency may afford a more precise objective at which to shoot--a level of prices which may be undercut with profit. It may be that this will not be carried out by filing the price concession for fear that competitors will retaliate; a more effective procedure may be to do it secretly without filing the new and lower price; or the same end may be accomplished by a secret agreement with the customer that the latter will receive a rebate or need not pay in full the price openly agreed upon and filed. This is a matter of evasion of filed prices and may be accomplished by devices so illusive in character as to escape detection by the most efficient enforcement agencies. It is to be distinguished from other cases of non-adherence, amounting to complete indifference to the filing requirement, which arises from the fact that the enforcement agencies are without sufficient power, legal, economic, or moral, to force compliance with the

rules established for filing and adherence.

A third problem facing an organized program of price publicity through price filing arises from the diversity of products and sellers which are usually brought under the scope of a price filing system. It is a problem of obtaining information which will describe the products or services which are offered in order that there can be a significant basis for comparing the prices which are asked. This problem would not exist if the price filing plan were confined to competitors selling identical products or services. But it has already been observed that, in most cases, vendors possess a product distinguishable in some respect from others either because of difference in quality or function, in appearance or style, or in brand or trade mark. In defining an industry for purpose of price filing it is not feasible to draw lines according to sellers of identical products; there are too few cases of such identity and what is more important, the seller is vitally interested in the prices of at least some of the most closely competitive products. Where industry lines are defined without especial reference to price filing, as they were in most instances under NRA codes, it is likely that there will be cases of vendors having an interest in some but not all of the pricing policies of other industry members--a situation which will depend upon the extent of differentiation in the products defined within the scope of the industry (*) and cases, too, of members of some industries having a direct interest in the pricing policies of members defined within the scope of another industry--a situation which will depend upon the extent to which slightly differentiated but closely competitive products are for some reason classified into separate industries. This latter situation, it may be noted, may cause serious difficulty or render filing without value, where the price offers for the products of one industry are publicized through price filing when those of closely substitute non-industry products are not brought under the same plan.

Returning to the problem of requiring information about the nature of the products for which prices are filed, one expedient which the industry may follow is to reduce the amount of product differentiation by establishing through organized control a greater degree of product standardization. It may fix rigid or absolute product specifications from which members are prohibited from departing, or it may adopt the more feasible approach of setting up minimum standards. If the latter, it is clear that only partial publicity of product characteristics will be afforded. Where, however, it is not possible or feasible to reduce actually the extent of product differentiation through standardization, an effort may be made to force members to file, together with price information, descriptions of the products offered for sale. The need for such information, it may be noted, arises particularly where products are going through a continued and rapid process of obsolescence and discontinuation. Such a program faces the manifest difficulties of obtaining data which are informative and readily comprehensivle as well as the possibilities of evasion and non-adherence. Practically, this approach offers a solution only for those products which already possess many common characteristics. Strictly non-standard, such as made-to-order, products

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(*) It is indeed quite likely that organized price filing will bring to
9826 light the existence of competitive products of which the competitor had not previously been aware.

may never be brought, effectively, within an organized plan of price publicity.

In short, the industry may have to rely in large part upon the general and none-too-certain knowledge formed by various members of the products which are most closely competitive with their own. This means that the price data disseminated must be identified by the name of the concern filing them. Identification of the seller becomes an important part of the price information.

Equally cogent reasons for seller identification arise from the fact that even though the product may be standardized the industry members may for reasons of reputation, personality, race or color vary considerably in their ability to attract the buyer. The competitor must know not only what prices but whose prices he has to meet. Similarly, identification is essential where there is a recognized leader or where there is a dominating member whose ill-will competitors will hesitate to incur.

Related to the problem discussed above, in that it arises out of the manner in which industries are defined for purposes of price filing and worth specific mention because of the importance which it assumed under NRA codes, is the situation faced by manufacturers selling in direct competition with distributors when the latter are not within the scope of the plan, and especially when in some degree they have the benefit of the publicity of the manufacturers' prices. This problem makes itself felt where some part of the products of an industry are sold directly to the consumer when another part are sold through intermediate channels such as wholesalers or jobbers. It is sufficient to say, at this point, that if the manufacturers cannot force the distributors into the price filing plan or are unable to control their prices, they may be sufficiently embarrassed by the competition of the distributors to abandon their plan for publicity.

A fifth problem which a program of effective price publicity may encounter grows out of the task facing the agency in disseminating the information received. It has thus far been assumed that every bit of information filed with the agency is automatically distributed to members. But where there are many industry members filing extensive and complicated prices and terms on a large number of products, the mechanical job of distributing all of the information to all of the industry members is likely to be too difficult or costly to carry out. The ends of full publicity will be defeated to the extent that such expedients as the following are adopted: The distribution of but part of the filed information as, for example, the lowest price on file; the distribution to any member of data on only those products which are directly competitive with his own; or the requirement that members wishing to see the prices filed by rivals must come to the offices of the agency where the filed information is made available for inspection. The agency, moreover, even though it were possible, may not be interested in distributing completely the information

filed with it. Specifically it may be more interested in using the filed data as a means of determining the extent of departure from a level of prices agreed by or imposed upon the industry members. The use of price filing as a means of policing conformance with standards set up by the concerted action of the group is discussed below. (*)

Thus far the discussion has been confined to the problem of publicizing price information for the benefit of sellers. It has been seen that the extent of monopolistic price formation through the independent action of competitors depends among other factors upon the extent to which business men are aware of the prospective price policies of their rivals. An organized program of price filing and dissemination, while a potentially effective instrument in supplying this information, faces certain fundamental difficulties in the way of effective publicity which have been suggested. A remaining phase of the problem of extent of publicity afforded and its bearing on monopolistic price formation is the nature and extent of the information made available to buyers.

Before proceeding to the question of publicity to buyers, however, it should be emphasized that price filing plans are limited by their very nature to affording information about only one of the competitive methods employed by business rivals, namely, price competition. Competition where products are differentiated may, as it has been seen above, (**) take the form of varying the quality of the product through improvement or deterioration; or of advertising and other forms of sales promotion or persuasion. If these latter methods are of strategic importance in an industry, price publicity will have a limited significance; and price filing plans will fall short of exposing completely competitive devices in use if it fails, as by its very nature it will, to bring to light the product and advertising policies of business rivals. Thus it may be that through price publicity prices and terms of sale become completely stable and uniform only to result in an intensification of competition in product or advertising. It is perhaps with this situation in mind that some industries consider as a necessary supplement to price filing a plan for the collection and dissemination of data covering the production or sales of individual concerns in order that they may know whether they are preserving their share of the total market. The functions and uses of this supplementary control device are discussed in detail below. (***)

(*) Below, page 71.

(**) Above, page 49.

(***) Below, Chapter IV, pages 315-329.

It remains to be again emphasized that price publicity through filing and dissemination while potentially an instrument for promoting monopoly price cannot effectuate complete monopoly power because it aids in the control of but one of three competitive devices which are employed in many contemporary industries.

The customers interest in knowing the price offers of rival sellers is the obvious one of being in a position to make the most advantageous selection among potential opportunities, and, thus, make the best of possible bargains. It does not follow, however, that without such knowledge buyers will be completely at the mercy of sellers or that any price may prevail in a market. As long as rival sellers are aware of each others' price offers they will protect their competitive position by making known to buyers their own prices and terms; or any buyer can presumably obtain the prices which competing sellers will ask of him by asking for them. But to the extent that buyers are not aware of the existence of all sellers in a market, those sellers' to whom they are confined by their own ignorance have a degree of monopoly control which they would not otherwise possess. Organized price publicity if extended to buyers, therefore, has a potentiality for promoting competitive pricing. The extent of the publicity to buyers will depend upon the amount of information filed by sellers and their adherence to their stated terms as mentioned above. It will likewise depend upon the amount of information which the filing agency--an agency of the sellers--is willing or his required to make available to them.

From the standpoint of the buyers and for implications respecting the competitive market, two other aspects of publicity to buyers are significant. One relates to the question of when the information is received by buyers as compared with when it is received by rival sellers--which is discussed in the next section; the other is a matter of knowledge by the individual buyer of the prices which are being offered to competing buyers--a question of discrimination which is discussed further below. (*)

(*) Below, pages 63-67.

c - The interval before information becomes available to sellers and to buyers. If monopolistic prices are to be achieved, business men must not only be fully aware of the pricing policies of rivals but also must have this information in sufficient time to eliminate the advantage of any one of them in initiating a price cut. In other words, to the extent there is a lag between the time a price reduction is announced by a seller and time the competitors learn about it there is incentive for competitive price reduction by the individual to enlarge his share of the available market. Price publicity through organized filing will, depending upon the speed with which filed information is disseminate, shorten this lag.

At one extreme are those plans which are limited to the collection and dissemination of past prices or prices on closed transactions. Under this arrangement some time, obviously, has elapsed between the original making of a price and when it becomes known by competitors--a lag which always exists but which will vary according to the frequency with which these prices are collected and the rapidity with which distributed to trade members.

Price filing under NRA codes, however, extended in practically every instance to the filing of price offers for all transactions taking place in the future until a new price was filed. The lag here would depend upon the interval between the time the price offers became effective and the time they are received by other industry members. Under the rules of the filing plan, the effective date might be the time the price list was mailed, or wired to the agency; when notification was received from the agency that the list had been received; or when the distribution of the list other industry members had been completed. The rapidity of the distribution of price lists would vary from the case where are wired or telephoned immediately upon receipt to the case where they are not sent out at all but merely awaited inspection by the interested member in the agency's office.

Where a waiting period of several days is provided before a price may become effective, there is likely to be no lag. Thus, in many codes a waiting period of as much as ten days was required--ample time to distribute the lists to all industry members. One theory behind the waiting period is precisely that of affording members opportunity to meet the prices filed by the competitors. In this respect it loses much of its signifacance and meaning if the lists are not immediately distributed to members but merely made available for inspection or mailed only upon specific request.

A given lag of time or absence of lag may, however, vary in significance as between different types of industries and markets--depending upon the speed of the buyers' adjustment to a new price as compared with that of the sellers'. To quote from one writer who has commented on this point:

> "Mr. Clark, thinks of the waiting period as a means of permitting simultaneous and uniform price change, as compared with the delay in the competitive market between the initiation of price change

by one concern and its imitation by others. This comparison seems to be based only upon the new opportunities which appear on the seller's side of the market. In cases involving a considerable number of small producers, doubtless it is true that a waiting period enables these enterprises to know of price changes and to adjust their own price policies much more rapidly than they could otherwise do. If, however, the prices filed are available to buyers, there may be an increase in the speed of the buyers' adjustment to a new price as well as in the speed of the sellers' adjustment thereto. In a market without price filing the competitive incentive to reduce prices, as described by Mr. Clark, would appear where the adjustments of sellers are sufficiently slow compared to the adjustment made by some buyers that an appreciable volume of sales is shifted to the concern which initiates the price reduction. In a market with price filing and with a waiting period, the question is still one of the relative pace at which information spreads on the two sides of the market. Granted that all competitive sellers adjust their prices within the waiting period, it may be that buyers who modify their purchasing plans when a price reduction is initiated do not get their information quickly enough to modify their plans again as competitors meet the new price. The degree to which buyers' adjustments are quickly made presumably depends upon the degree to which purchase is made by relatively few concerns in relatively large quantities.

"All this seems to me to mean that when there are large numbers of small buyers and sellers the waiting period does not automatically deprive buyers of an incentive to favor the concern which initiates a price cut and hence does not automatically deprive sellers of the incentive to take the lead. When buyers and sellers are relatively few and transactions relatively large, this fact in itself interferes with the type of competitive price adjustment which Mr. Clark has in mind". (*)

(*) Memorandum from Corwin D. Edwards to L. C. Marshall, "Mr. Clark's Theory Concerning the Waiting Period in Open Price Systems", pages 1-2 (October 7, 1935,) in NRA files. For Mr. Clark's full statement, see Memorandum from L. C. Marshall to All Section Heads and Unit chiefs, "An Interesting Issue", (August 29, 1935), mimeographed, in NRA files.

Only one point needs mention in connection with the above: Price filing may change a previously existing relationship in an industry either by speeding up relatively the sellers' adjustment or by speeding up relatively the buyers' adjustment to price changes. This will depend upon the extent and rapidity with which information is disseminated to sellers as compared with buyers. The presumption, where price filing is administered by the sellers, is that the sellers will in this respect be favored.

It has been shown that monopolistic price formation through the independent action of sellers in a market depends upon the three factors of farsightedness by business men in acting toward the end of their best interests, the extent of the knowledge possessed about the pricing policies of competitors and the time lag between the announcement of a price change by one seller and the knowledge of this change by competitors. Conditions under which price publicity through price filing and dissemination may contribute to these ends have been suggested.

Implicit in pure competition and a necessary condition of perfect competition is accessibility to the market on the part of buyers and sellers. (*) In the section which follows an attempt will be made to suggest the ways in which price filing may promote or prevent accessibility on the part of buyers and sellers to a market.

2. Price Publicity and Accessibility to the Market.

(a) Introduction - historical meaning of a "free" and "open" market.

The perfect market is a "free" and "open" market in the sense that everyone has equal opportunity in or equal access to it. Rules governing conduct in such a market had their origin in feudalism and early mercantilism where "owing to the weakness of government and the violence and perjury of the people, it was necessary to encourage powerful lords to set up markets and to protect them from the inroads of robbers and liars". (**) These markets were eventually governed by the decision of the common-law courts which developed the principle of the "market overt" or the "public, free and equal market". In order that all traders might have equal access to this market, the principle of publicity of transactions was developed whereby the sales of goods must be in a place that is "overt and open, not in a back room warehouse, etc." and "not in the night" but between the rising and setting of the sun. (***)

Practices and customs preventing secrecy and concealment were upheld in the case of one of the modern organized markets by the Supreme Court in Chicago Board of Trade v. United States (****) where the rule in question prohibited members from making secret sales and purchases during the time when the board was not in session. The Court in the case upheld the purpose of equal opportunity or equal access to the market

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(*) Above, page 44.
(**) Commons, op. cit. p. 775
(***) Ibid, pp. 775-776
(****) 246 U. S. 231 (1918).

to prevent monopoly and discrimination through "publicity, or as nearly perfect knowledge of all the facts by all parties as the circumstances will permit." (*)

The bearing of publicity through organized price filing on the issue of equal access to the market must be examined, however, with competitive market situations vastly different from organized commodity exchanges in mind. Specifically, the bearing of price filing on two kinds of interferences prevalent in the unorganized and imperfect markets with which NRA codes dealt must be investigated. These interferences may be called discrimination and predatory price cutting. (**)

(b) Price filing and discrimination.

One type of discrimination has already been referred to. (***) This practice arises where the seller, to enlarge his share of the market, reduces his price to single customers or classes of customers without extending the reduction to others of his customers. It is a strategic market device whereby the vendor may increase his portion of business without the need for changing or disrupting his entire price structure. It may be accomplished through any one of a number of devices such as lengthening of trade, quantity or volume discounts, either with or without the creation of a new customer classification, granting more liberal allowances, extending terms of payment, or as in the case of single buyers rebating part of the original purchase price, or moving the individual buyer from one classification of customers to another which is granted a more favorable trade discount. It creates a situation in which those buyers who are discriminated against have a less favorable access to the market than those in whose favor the discrimination is made and gives to the latter a competitive advantage in the resale of goods. It is made possible because the discriminatory price is secret - a price of which the less favored buyers are ignorant. It will not withstand exposure to these other buyers because they will immediately demand a similar concession, a demand which the vendor will refuse only at the penalty of losing his business.

Price filing has an obvious and important function in reducing this type of discrimination. The plan of publicity if it is to be effective in this direction must, of course, provide for complete and effective dissemination of prices and terms to buyers. Dissemination of only a part of the pricing policies of the filing sellers, or filed prices to which the sellers in practice are not adhering, will make questionable the attainment of this end as may such procedures as limiting the dissemination to making the lists available in the offices of the filing agency for the inspection of the buyers. This becomes particularly true if the buyer is given, or is permitted to see, only the prices filed for the classification of customers to which he belongs. The discrimination may lie precisely between the group of customers under which he has been classified and another classification the sellers' trade prices to which he may not see. The refusal to concerns

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(*) Commons, op. cit., page 713
(**) See above, page 44 for definitions.
(***) Above, page 55.

classed as "retailers", for example, of information about price terms to concerns classed as "mail order houses" or "department stores", when both are competing for the same market, may in effect entirely defeat this function of price publicity. The buyers' sphere of indifference to the price terms granted to members of other classifications is not in fact, definitely determinable in advance. It is conceivable that concerns designated as "wholesalers" or "jobbers", although not theretofore in such a position, may as a result of a special price be placed in a position to compete directly with other establishments labelled as retailers. Customer classifications do not necessarily have a functional significance; they may for any seller represent a flexible and strategic device designed to accomodate a changing price policy with respect to individual customers.

Discrimination may be along geographical lines also. Unless compensated for by differences in other elements of the price, any policy which forces a customer to pay for more of the cost of transportation than is paid by his competitors is a discriminatory one. Where freight is a minor element in the cost of placing the product in the hands of the buyer, this type of discrimination, of course, is not of great consequence. In other cases it may be, and effective price publicity to buyers irrespective of location may serve to reduce it.

It should not be concluded that sellers have no interest in the kind of discrimination discussed above or that price publicity limited to sellers will contribute nothing to its elimination. The very incentive for the discrimination, as in the case of other price reductions, may not exist if rival sellers are aware of it in time and are in a position to meet it. Whether they can meet it will depend upon the possibility of establishing contacts with the buyers for whom the discrimination is proposed -- which may be difficult, for example, where the initiating seller has a long-established contact with a large buying establishment. But if the initiating discrimination should be met by competing sellers through extending similar terms to buyers similarly situated, the incidence of the discrimination is the more disastrous for those buyers against whom it is practiced.

Two other types of discrimination may be distinguished; for these price publicity may be a very uncertain tool of correction. One of these is discrimination where exercised by a seller who possesses complete or a high degree of monopoly of the products of an industry. The motive is to maximize the total profits of the concern through making the best price adjustment to the varying demands of different classes of customers. The fact that those buyers who are discriminated against are aware of this special price given to buyers with whom they compete does not place them in a position thereby to correct the situation; they cannot effectively demand similar concessions because by the terms of the situation they are dependent upon the seller for some, if not all, of their merchandise.

A familiar complaint by small manufacturers of discrimination as practiced by certain of their competitors may arise from this situation. It relates to a circumstance where a dominant member of a group of dominant members of an industry sell directly to large chain or mass

distributors who compete directly with jobbers or wholesalers and independent retailers through whom the complaining manufacturers distribute their products. These sellers do not have sufficient resources to meet or enable their distributors to meet consistently the lower prices of their larger rivals; neither can they afford to abandon their precent distribution channels and bargain for the business of the large buyers in the same terms as their competitors.

Price publicity, however, is not without some bearing on the discrimination of monopolists. If through price filing such discriminations are brought to light, they may become a target of impassioned opinions and condemnation on the grounds of trade ethics - which may ultimately lessen consumer goodwill for the products of the monopolist. Or if discrimination is illegal, as it is under the Clayton Act, price filing may serve to call the illegal practice to the attention of the enforcement agency. It is probable that any plan for making effective publicity of such transactions would be forcibly imposed upon the industry - without the consent of the monopolists and in face of their probable sabotage.

A third form of discrimination may arise as a result of coercion by buyers - either by single powerful buyers or by smaller buyers acting in unison through medium of a boycott. Price publicity through filing and dissemination if effective at all would, as in the case above, serve as a corrective by exposing these discriminatory transactions for condemnation by group opinion or by a public agency charged with the duty of administering a law which prohibits them.

In this connection should be noted a possibility that certain forms of price discrimination may be increased by price publicity. Discrimination consists not only of unlike treatment of similar customers, but of identical treatment of dissimilar customers. To insist upon uniform prices might be as truly discriminatory as to grant varying prices where no special advantage exists. Yet the large buyer is often under attack by his smaller competitors regardless of the efficiency of his buying practices. The seller may be exposed to a tacit boycott if he is known to give the large buyer any considerable advantage, whether legitimate or not.

C. Price Filing and Predatory Price Cutting.

The devices of predatory competition are various. Of particular interest here is price cutting for the purpose of preventing the entrance of new member to a market or of ruining or driving out of the market an existing competitor. Publicity of predatory prices, it may be said at once, will not bring an automatic corrective. That which makes predatory competition possible is monopoly powers. Except as publicity may expose the guilty concern to the effective moral pressure of group opinion or inspire a fear of prosecution its effect will be inconsequential.

On the other hand, there is a probability that in some cases price publicity will intensify or inspire predatory price cutting. A concern actively interested in eliminating its weaker rivals presumably will attack their prices with more precision and economy if it knows specifically what they are. Or it may be that price publicity will for the first time bring to the attention of a dominating concern the existence of small but effective competitors against whom it may proceed in an aggressive campaign of extermination.

D. Price Publicity Under NRA Codes - The Scope of the Present Study

The preceding section completed the summary of possibilities offered by publicity through price filing and dissemination for strengthening a tendency away from perfect competition of for contributing to a greater attainment of this ideal. It has been seen first that the publicity of prices will accentuate monopolistic price formation depending upon its action on these factors:

(a) The farsightedness with which rival sellers behave in the direction of their ultimate best interests.

It was concluded that the bearing of price filing on the mutual awareness by business rivals of the consequences of their own pricing and selling policies was probably negligible except as it contributed to experience in following an industry leader, it was emphasized because the degree of mutual awareness or foresightedness was indeterminate price publicity through price filing might result either in an intensification of competitive price cutting or in monopolisitic pricing.

(b) The extent of the price and other data made available.

It was apparent that price filing had direct and obvious function in extending to sellers information about the prospective price policies of competitors and depending upon the degree of "farsightedness" possessed in promoting monopolistic price formation. It was concluded, however, that most plans for price filing and dissemination would encounter administration difficulties which would almost certain defeat in part the end of complete and effective publicity.

Price filing had an obvious end, it was seen too, in promoting publicity of prices to buyers and, consequently, in preventing in some degree monopolistic price control; the obstacles in the way of enlarging the publicity to buyers were considered to be greater even than in the case of sellers.

(c) The interval before the price information becomes available to sellers and buyers.-

On the interval, which would be shortened by price filing and dissemination, between the effective date of the price list and the date it was received by competitors depended the rapidity of price adjustment and hence the extent of monopolistic price formation. However, even under a waiting period where the interval might be negative, it was found that incentive for initiating a price cut could be present depending upon the speed of the buyers' adjustment to a new price compared with that of the sellers'.

In the second place, it was observed that price publicity would promote or prevent accessibility, a necessary condition to a "free" and "open" market, depending on the extent it reduced:

(a) Discriminatory pricing-

It was apparent that where it depended upon secrecy price filing had a good chance of reducing or eliminating discrimination, the chief qualification being the kind and amount of information made available to buyers; but that where discrimination was backed by monopoly power possessed by either sellers or buyers the value of price publicity as a corrective device was limited to affording a target for aggressive group opinion or evidence for prosecution.

(b) Predatory price cutting.-

It was concluded that price filing likewise might be significant in exposing the guilty concern to moral pressure or prosecution; but that, on the other hand, it might afford a dominating concern a more precise objective on which to focus its destructive tactics.

Limitation of material (*) and insufficient time have made it impossible to explore little more than a fragment of the functioning of price filing plans inder NRA codes in terms of the problem developed above. Positive evidence with respect to either the effects of NRA price filing plans on monopolistic price formation or on the matter of accessibility to the market was not readily available. This was particularly true of the latter question and the important issue of discrimination. (**) Information which indicates the amount of

(*) See appendix C,Exibit I.

(**) This a difficult subject of investigation in any case (witness the two-year investigation by the Federal Trade Commission into the question of Goodyear's allegedly discriminatory prices to Sears Roebuck) because among other things of the need for precise and accurate cost data.

publicity achieved and ignorance eliminated particularly on the part of buyers may, however, represent important evidence of an indirect character as to the elimination of that kind of discrimination which depends upon secrecy.

Specifically, it was possible to collect a considerable amount of evidence bearing on the amount of publicity to industry members and to customer which resulted from the operation of price filing plans. This evidence is presented in Chapter III and covers the code provisions for publicity, the adminstrative rulings expanding or modifying the code provisions, the performance of members in filing complete information about their pricing policies and in adhering to those policies once announced, and the manner, the extent of and rapidity with which the filed information was distributed or made available to sellers and to customers. The material bearing on the dissemination of filed information contains much evidence of value on the question of the length of the interval between the date price lists were effective and the date they were received by industry members and customers. In the course of presenting this material the difficulties encountered by the filing agency in administering the plan are touched on.

But even this evidence is not conclusive since it offers little that is definite about the extent of publicity prior to the inception of the price filing plans. Some observations on this point are made.

Because of their importance in indicating not only the potential or hoped for results and thus among other things the degree of "farsightedness" possessed, but also as possible evidence as to the actual results of price publicity, considerable attention is given in Chapter III to the intended functions of price publicity both as originally expounded by code proponents and as signified in their behaviour under the plans.

Attention has thus far been directed primarily at what may be called the "publicity function" of price filing. There remains to be discussed what has been termed the "control function" of price filing.

E. The control function of price filing and the present study

The primary and essential aim of price publicity under filing plans to which attention thus far has been mostly devoted is precisely that of making known the pricing policies of sellers to their competitors and to buyers; more ultimate functions and possible effects of price publicity have been suggested. To be distinguished are the control functions of price filing plans whose primary aims are

(1) As a part of the price filing plan itself to establish limitation on the pricing policies of participating members and

(2) To supply information with which to police the observance of rules made outside of the price filing plan.

There must first be distinguished from these essentially control elements of price filing plans those rules and regulations established to make possible effective price publicity. Systems of price publicity themselves are in part a composite of various working rules designed to secure and distribute price information. Thus industry members are prohibited from making sales except at the prices and terms which they have filed with the collecting agency; and this agency is required to distribute filed price lists to members and perhaps to customers, immediately upon receipt. As obstacles to effective publicity arise new regulations may be adopted.

However, as soon as these rules extend to the actual restriction of elements of the participating members' pricing policies, they cease to have the effect solely of promoting price publicity and represent in fact a direct form of price control. In brief, that which could not be accomplished through a system of mandatory price publicity, where restrictions are limited to, but may not properly extend beyond, exposing all elements of a price policy or structure, is sought to be accomplished by the fixing or "stabilizing" of price or otherwise dictating the kind of prices which can be made.

Regulations then which in some manner determine the kind of or establish limits to the prices that may be charged by participating members - whether these regulations are a part of the original provisions or whether they are issued by fiat in the administration of the system - represent the first of the control phases of price filing. The variety which these rules may take is limited only by the variety of the elements which may prevail in the price structure of an industry. As examples: Requirements may be imposed as to the method of quoting for delivery - that prices shall be on a delivered f.o.b. basis; that no freight shall be allowed or that freight shall be equalized; that cash discounts shall not be given or shall not be greater than a specified per cent; that product guarantees may not be granted or the return of merchandise accepted; that free deals and premiums may not be given; that advertising or trade-in allowances may not exceed a certain maximum; that discounts for quantity or volume purchases may not be extended past a specified figure; or the manner in which members may classify their customers may be rigidly defined as may the discounts which can be granted to these customers. Stabilization of the elements of the price structure either by the original provision or in the administration of price filing plans under the NRA may or may not have been designed merely to make orderly publicity and comparability of filed prices possible. The essential point is that they represented an integral part of the body of working rules governing participation in the filing plan, and may not be disregarded in interpreting the meaning and significance of price filing under NRA codes.

As such, these rules have the effect of modifying price competition in a manner which is more direct and sure than the elimination of price competition through publicity alone--which as was seen above depends for its effectiveness on a large number of variables that are highly uncertain in character.

It is true, of course, that provisions similar to the above were incorporated in NRA codes quite apart from open price provisions and

without any ostensible relation to them. Although investigation of the functions, operation, and effects of these code provisions was quite beyond the scope of the present study, some observations are made in Chapter IV as to their functional bearing on price filing.

Another control aspect of price filing, however, relates directly to the functional bearing of price filing on other code provisions or schemes of price control in effect within an industry: It has been called the policing or compliance function of price filing. Under the codes price filing operated to supply the enforcement agency of the industry with information with which to check the members' conformance to other code provisions. They were usually minimum price provisions of which prohibitions against selling below cost represented the most important type; but in some instances they were more limited in scope applying only to price elements such as maximum terms of payments, discounts, or allowances.

In some cases the price regulations were not approved through formal code procedure but were established by the industry agency unofficially and informally. The degree of precision enjoyed by these informal standards varied from open promulgation and broad cost by the code authorities to veiled suggestion on specific occasion about the desirability of maintaining price. The sanctions employed against the price cutter in these instances might range from the mere focusing of group opinion to aggressive sales effort directed toward his customers.

The distinction between these two control functions of price filing plans, while necessary from an analytical standpoint to distinguish clearly the control from the publicity aspects of price filing, has not been used formally in the organization of the evidence presented in Chapter IV,"Price Filing as a Control Device". It was frequently impossible to distinguish the activities of the industry agency as belonging to one rather than the other category. The price-filing agency was usually the code authority which administered other of the code provisions and served as the agency for establishing and enforcing informal rules and agreements. Thus, the price data collected may have been used as a check on the conformance of members to restrictions imposed in the administration of the price-filing plan or of some other code provision. In any case it seemed most significant to group the evidence around the objectives of the controls to which price filing was related or was a part, indicating where possible the kind of a role played in the entire going plan of industry control.

It was found possible to state the role of price filing in effecting only some of the main objectives of industry control under the codes-control over the price level, over price changes, over various elements of the price structure, over channels of distribution, and over the division of business. This grouping of objectives though necessary for analytical purposes is, of course, somewhat artificial. In each group, moreover, only some of the various roles of price filing were treated. Thus the discussion of control over the price level was confined to the functional relationship of price filing to cost provisions and activities; and the control over price changes to a discussion of the waiting period. It should be noted at this point that other than purely control

functions of waiting periods, including the important one of affording time for distributing filed price offers before they become effective, are discussed in Chapter IV as well.

F. The Price Structure Under Price Filing

By their nature, price filing systems become peculiarly rich repositories of information about the character and movement of prices. It is possible to draw from them an unusually complete picture of the price structure of an industry at the time when price filing began and of the changes in that structure under the price filing system. Apart from the administrative characteristics of price filing systems in enhancing general knowledge of prices, or in extending control over prices, the character of the prices themselves must be regarded as a significant aspect of price filing.

Of course, it is difficult, and often impossible, to trace the effect of price filing systems as such upon prices (not to speak of the separate effects of the publicity and control aspects of price filing). The price files revealed the joint effect of all code provisions calculated to influence prices and, in addition, the impact of the entire economic environment upon the industry in question. If prices rose, it may have been because a farm program made customers more prosperous, because prospects of an international war stimulated rearmament, because a mandatory cost floor operated to require higher prices, or because the gradual depletion of inventories forced replacements. If prices became more uniform, it may have been because the leaders in price cutting were suffering less economic pressure than at an earlier stage of the depression.

It is, nevertheless, theoretically possible to describe the characteristics of price change in price filing systems in a variety of industries and to analyze this information in the light of what is known about the purposes and activities of those administering the system and about production, stocks, sales, and competitive conditions in the industry in question. Without strong statistical correlation, one may yet achieve, by analysis, persuasive results. The limitations of this report in describing the effects of price filing systems upon the price structure are due primarily to the short time and small staff available for the work.

Even the most cursory survey, however, makes clear the variety of price structures and price movements which accompany price filing systems. It is evident that no single development in the price structure may be readily attributed to price filing as such. The characteristics of the particular price filing system and of the particular industry to which it is applied are evidently more significant than the mere fact that there is price filing.

The characteristics of the price structure to which attention should be paid are as follows:

(1) Relative treatment of different customers by the same concern.

(2) Degree of uniformity in prices among competing concerns.

(3) The degree of complexity in the price structure.

(4) The frequency and range of price change.

(5) The direction of price movements.

It has not been possible to give adequate treatment to these subjects in Chapter V, "The Price Structure Under Price Filing." The cases there presented are organized primarily to show the direction and extent of price movements under price filing. They also give information about changes in the treatment of different customer classes and about the extent to which uniformity developed in the prices filed. However, these subjects are not treated fully. Lack of time has prevented analysis of data to indicate the degree to which the price structure became more complex under price filing.

The complexities inherent in the five characteristics of the price structure just listed demand some further consideration.

1. Relative Treatment of Different Customers by the Same Concern.

A significant characteristic of any concern's price structure is the degree to which it treats various customers alike--particularly because price filing is often advocated as a means of preventing or reducing discrimination among customers. The extreme of equality, which is never found, would be to charge the same price to all, regardless of the date of payment, the quantity of purchase, the economic function of the buyer, or any other variable. When price classes are established in recognition of these variables, it is possible to enlarge or reduce the price advantage given to a wholesaler over a consumer, or that given to one who buys in large quantities, regardless of his function. Cash discounts may be large or small, as may freight allowances, or any other variable based upon differences in the character of a purchase. The treatments of the most favored and least favored buyer may be compared, in order to indicate any changes in the spread in prices under price filing.

2. Degree of Uniformity in Prices Among Competing Concerns.

A second significant characteristic of an industry's price structure is the variation of price from one concern to another. This variation has many aspects. Different enterprises may establish price classes among customers according to different principles of classification. One concern, for example, may classify customers by quantity of purchase; another may distinguish wholesalers and retailers; a third may make quantity distinctions among wholesalers while maintaining their functional distinction from retailers; a fourth may recognize special groups of commission merchants, brokers, and the like, not separately treated by the others. The first necessity of price comparison, therefore, is to examine the customer classifications prevailing at the beginning of price filing and to determine whether they become more or less similar during the filing period.

A second range of comparisons is in terms of sale--quantity discounts, cash discounts, freight allowances, and the like. Some of these terms apply to all customer classes and so may be compared directly from enterprise. Other terms, which are not open to all, must be compared for

the particular customer classes to which they apply; so that one necessary question is whether a given discount is offered to more customer groups by one enterprise than by another. Still other terms of sale--quantity discounts, for example--may not appear at all in the price structure of certain enterprises. Two questions arise, therefore, in comparison of terms of sale: First, the degree to which certain terms of sale come to be used by the various concerns in the market; and, second, the degree to which the price concession involved in a given term of sale is of the same magnitude from one concern to another.

A much simpler type of uniformity is that in list prices. By themselves, uniform list prices mean very little. With uniform terms of sale, uniform list prices necessarily produce identical net prices. There may, however, be net price identity with widely varying list prices provided the terms of sale are adjusted to compensate for the variations.

Net prices can be compared only with difficulty. If list prices are identical, whereas some terms of sale are identical and some are not, uniformity of net prices will exist for certain customers and not for others. Question then arises whether the uniformities appear in the more significant or less significant parts of the price structure. To answer this question, one needs to know the volume of sales made to various customers and under various sales terms, information which typically is not available.

Judgment as to the significance of the degree of uniformity found is beset with difficulties. The usual test for uniformity is to check the prices of all manufacturers of a representative product as of the same date. Where different producers sell to different customer groups or to customers located in different parts of the country, et cetera, this test may prove to be very misleading. It may well be that the group of customers served by one producer or group of producers is sufficiently isolated from the main market that when these customers are buying, other sellers and buyers have little or no interest in the prices quoted to them. Later, another group of producers and customers, or the entire market, may become competitively active. This condition is especially probable in an industry such as the Fertilizer Industry, where different geographic sections of the country grow different crops, use different kinds of fertilizers, and are interested in buying at different seasons of the year. Under such conditions, a new price initiated by a member of the group of sellers competitively active at a particular period may not be met for weeks or even months by the members of other seller groups. In fact, it may never be met at all if conditions should change, either locally or nationally, in the meantime.

Much the same condition as that outlined above may prevail in the case of customer classifications. It often happens that producers are interested in different channels of distribution. Under such conditions, unless prices are compared for the same customer classes and the same quantities, et cetera, the result has little significance except as a test of the range of prices in the industry.

Another consideration that must be kept in mind arises from the fact as discussed above (*) that competition takes place not only in price but through product differentiation---in the quality of the product, in trade marking and use of brands, in supplementary services, etc., and in advertising and other forms of sales promotion. In some industries there may be no products which are standard for all producers. Of if the product is standard in terms of its physical characteristics, it may command a varying amount of consumer preference, due to the good will established through marking, branding, advertising, etc. In these cases, it is probable that for an identical product different prices may be commanded by different vendors. Thus strict uniformity in prices for an identical product is not inconsistent with the existence of differentials, and the problem becomes one of determining whether there has been a tendency for the prevailing differentials to narrow or, on the other hand, to be lengthened. A like problem exists in those industries where the basic physical products, although similar and closely competitive as between rival sellers, are enough different to result in price variation. Finally, dominant concerns, in some instances, may disregard their immediate advantage and voluntarily allow to smaller rivals producing the identical product a slight price differentials, which becomes a persistent characteristic of the price structure.

3. The degree of complexity in the price structure.

A separate question is whether the trend of the price structure is toward the inclusion of more customer classes and more terms of sale, or toward reduction in their number. Insofar as the various price structures of competing concerns are publicized to buyers and sellers, it is conceivable that each concern will make its price structure more complex by adopting classifications which appear in the price structures of its rivals; or, alternatively, that under pressure the more unusual customer classes and terms of sale will be abandoned, and only those types of variation maintained which are general in the industry. The first alternative would produce a more complex price structure, the second a more simple one.

4. The frequency and range of price change.

The characteristics of the price structure thus far discussed are all aspects of the net change which occurred under price filing. Question also arises as to how often and within what range of fluctuation changes occurred. This question gains additional interest because price filing is often advocated as a means of producing stability in prices.

An extreme possibility would be the absence of all change from the

(*) Pages 49-50.

initial filing of prices and terms until the end of the price filing period. Only less extreme would be the adjustment of the price structure by one refiling in which every change is included. Usually, however, there were repeated alterations in the prices and terms of sale. When these alterations occurred frequently at the beginning of the price filing period, and less frequently at the close, it may be assumed that relative stability was developed. When the changes were not thus concentrated, but the later variations filed were confined within relatively narrow limits, the stability appears to have been different in kind but equally real. Absence of any stabilizing influence is indicated when fluctuations were as wide in extent and as frequent at the end of the filing period as at the beginning.

5. The direction of price movements.

A further question is whether net prices during the price filing period rose, fell, or remained approximately the same. Where the trend of price changes was relatively slight, the difficulty in determing net prices obscures the character of the movement, and the price level may be regarded as unchanging. Considerable changes in price levels may be traced in spite of this difficulty.

Price movements are more remotely connected with price filing than are the internal adjustments of the price structure discussed in the preceding paragraphs. The price structure is sufficiently complicated that price filing probably adds to general knowledge about it; and in certain cases the play of competitive imitation in the adjustment of parts of this structure appears clearly in the filings. The broader movements of the industry's price level, however, depend in large part upon influences in the market to which price filing may have only a collateral relationship. During the NRA period, for example, the trend of prices was generally upward as a part of the emergence from depression. Hence only conspicuous price changes simultaneous with marked alterations of the price filing system are even presumptively traceable to price filing.

Price Changes as Evidence of the Monopolistic or Competitive Character of Price Filing.

Among the tests of the monopolistic or competitive character of a price filing system have been suggested (1) the level of prices as compared with the levels previously prevailing, (2) the degree of uniformity or spread in the prices filed and (3) the kind of price fluctuation which takes place from time to time. It is argued that a higher price level under a price filing system is evidence of collusive action or coercive domination by huge enterprises, and the continuance of the same or a lower level is evidence of competition. It is argued that while the effect of price filing should be to reduce the spread between the highest and the lowest price, it is unlikely that commodities will be so standard and competition so perfect as to produce an absolute identity of the prices of competitors; and that such an identity therefore provides evidence of monopolistic price fixing. It is argued, too, that simultaneous price changes filed by a considerable number of producers are strongly persuasive of monopolistic price fixing. When these characteristics of uniformity, simultaneous change and rising prices appear together, their evidential value is thought to be greatly enhanced.

These tests, taken alone, appear to be highly unsatisfactory, both because the presence of the so-called symptoms of monopoly may be otherwise explained than by collusion or coercion and because the absence of these symptoms is not necessarily evidence that monopoly does not exist. The increase of an industry's price level after initiation of price filing may be due to no more than the termination of a predatory price cutting campaign undertaken by some large enterprise as a means of coercing independently-minded small competitors. Again, if price filing promotes competition and thereby the establishment of a more truly competitive price, it is as possible that the previous price was lower than the competitive norm as that it was higher. Furthermore, the movement of prices is the result of a complex of forces of which price filing is only one; and the new price level therefore may not be directly traced to the establishment of a price filing system.

Just as an increase of price may be consistent with competition, the absence of an increase may be consistent with monopoly. If a well established monopolistic group should adopt a price filing system as a convenience, there is little reason to suppose that it would maintain, after the adoption, a price higher than before.

An effort to discover monopoly by watching the spread of prices must likewise be inconclusive. As the foregoing pages have indicated, a price is a complicated offer to sell, including not only the list price quotation but also various discounts, allowances, delivery terms, and the like. Unless all concerns in an industry are quoting exactly the same terms of sale, a price change by any one of them can scarcely fail to affect different customer groups in different ways. As a result of the change, one customer group will find the enterprise quoting prices more nearly like those of its rivals, but another customer group will of necessity find that the opposite is true. The discovery of price uniformities is therefore a complicated matter in which there is great question what

relative weight to give to uniformities in various terms of sale, uniformities in list prices, and uniformities in the net price to important groups of customers. It seems probable that the exchange of price information, even under conditions of the most intense competition, would promote at least some of these uniformities. If this probability is granted, the question arises whether uniform cash discounts or freight allowances are any more or less indicative of monopoly than uniform list prices or uniform net prices to quantity buyers. Indeed, it appears that in modern markets the practice is often to establish a price equal to that of a competitor and to compete in quality or in terms of sale. Therefore, while the presence of price uniformities is consistent with price fixing, it is also consistent with various degrees of competition in the market.

If prices are changed by the simultaneous action of a number of enterprises, the probability appears that these enterprises have acted in concert. It is apparent, however, that collusive price changing need not take this form. In a price agreement one concern may readily lead and others follow. Moreover, a price agreement may be consistent with a willingness to let certain members of the agreement sell regularly at a slight discount. In such cases price changes may be dissimilar not only in time but in extent. Again, certain concerns sell to customer groups some of which are sufficiently isolated from the rest of the market that when sales are being made primarily to these customers other producers have little competitive interest in the price; whereas later when other customers begin to buy the price may be of general interest. Under such conditions a price change becomes significant to different sellers in the market at different points or at different periods of time. Hence it may well be that a new price initiated by one enterprise in January need not be met by another enterprise, either under competition or under monopoly, until February, at which time the second concern's markets become active.

Statistical tests of the extent of monopoly or competition appear, therefore, to be very difficult. Information about the character of the price structure in an industry under price filing may be combined with an analysis of the organization of the industry, the principle influences bearing upon its market, the nature of the price filing system established, and the apparent purposes of those administering the system. The statistical evidence may be valuable to corroborate or refute a hypothesis based upon the other materials. Except, however, in the case of two industries, Steel Castings and Asphalt Shingle and Roofing, it has not been possible to attempt to elaborate a survey in this report. These two cases will be found in the Appendix. The principal usefulness of the materials which are filed is apart from their value as evidences of monopoly or competition. An appraisal of price filing necessarily includes an estimate of its probable effect upon the degree of uniformity in terms of sales and in net prices to various customers and upon the frequency, extent, timing, and direction of price changes. The character of an industry's price structure is significant in itself apart from the degree of monopoly or competition which may lie behind it.

II. THE ADMINISTRATIVE PROBLEM

The administrative problem facing NRA in connection with price filing was essentially that of any other substitution of government for private regulation of business, and the utilization of administrative rather than legal agencies for effecting that regulation.

It has been stated that "It is a part of the American tradition that it is the function of the Government to protect and foster the public interest." In 1933 the emergency was sufficiently grave that NRA and the proposed "Partnership between Government and business," met with almost general acceptance as an instrument of the public interest.

Whether the "partnership" as originally conceived and as embodied in the codes was based upon a correct interpretation of the public interest and its relationship to the conflicting private interests, is a moot question not within scope of this study, which is concerned only with the part played by price filing as one device utilized by that partnership.

The forms of price filing utilized by NRA had previously been condemned by decisions under the anti-trust law as involving "restraints of trade" not consistent with the maintenance of a free and open market. Their development had been suppressed and regulated by these decisions as inimical to competitive price determination, and involving a degree of price control by cooperative means too great to be entrusted to private hands.

The admission of these forms of price reporting to NRA codes involved the partial suspending of the restrictions of the anti-trust laws. The NRA was, in effect, substituting a form of administrative regulation for the previous legal restrictions. It was choosing to permit certain forms of cooperative price control previously banned by the anti-trust decisions (including future price reporting) but it was not abandoning the ends of competitive price determination which those decisions had presumably supported.(*)

The self-government of Codes of Fair Competition was to be carried on only under administrative supervision. Price-fixing and price control measures were to be admitted only under adequate safeguards to insure that the prices resulting from them were fair and served so far as possible the social ends of competitive prices, even though they were arrived at by other means.

(*) National Industrial Recovery Board, New Policy, Series, No. 1, p.3 "The principle of price-making by competition in a free and open market is established in the common law, the anti-trust acts and public policy." Cf. also, Handler, Milton. "The Sugar Institute Case and the Present Status of the Anti-Trust Laws." The Columbia Law Review, January, 1936, page 7. "Whatever may be the advantage of a regime of administrative price determination it is not the price pattern which the Sherman Act presupposes. Even were the Sherman Act to be changed, price-fixing by industry, however accomplished, could hardly be countenanced without pervasive public supervision."

The administrative problem was fundamentally one of maintaining a balance of conflicting interests among the members of the industry concerned, between the industry and its customers (including distributors) and between the particular industry and other parts of the economic system. It entailed the most effective use of approved price filing plans to bring about such salutary results as were to be obtained through publicity and accessory controls, and yet the prevention of undesirable results such as price-fixing, unduly high price levels or inequitable competitive pressures.

The problem of harmonizing or balancing these conflicting interests was complicated by differences in the strategic positions of these groups, their different degrees of cohesion and organization, and the resultant economic and political pressures which each could exert pursuant to their interests in the code-making and in the administrative process.(*)

The cooperative nature of the price filing mechanism, and the avowed character of the NRA and the codes of fair competition as measures of industry self-government, led naturally enough to the actual operation of price filing plans by industry bodies.

The fact that price filing is a dynamic form of cooperative activity and not a static trade practice prohibition with well defined characteristics, made this circumstance of self-government far more important in the case of price filing than in other price control devices. Price filing provisions were literally enabling provisions for the setting up of "going price filing plans."

The ultimate responsibility for the character of these plans and for their operation in conformity with the enabling provision, and with certain standards of public interest, properly remained with the administrative organization conferring the authority.

Experience with the price filing device under codes early indicated the need for reexamination of the price filing device, both as a control and as a publicity measure, and a repossessing of some of the discretionary powers and privileges bestowed in the early days of code making. Such reexamination led to formation of policy and its progressive modification and application through code revision and through supervisory action.

A descriptive analysis and an appraisal of the NRA experience in approving and in administering price filing provisions will be given in Chapter VI, "NRA Administration of Price Filing." This experience focuses on a program of industry price filing under public regulation and supervision. It indicates many of the problems encountered in such a program, and offers some appraisal of the adequacy of NRA's approach to them, within the limitations imposed by the enormity of the task itself, the facilities afforded, the stress and haste of the emergency, and the absence of any large fund of previous experience.(**)

(*) The advisory set-up utilized by the NRA was a recognition of these conflicting interests. But final responsibility for administrative decisions remained with the Administrator, and later with the NIRB.

(**) The Chapter deals entirely with the administrative problem from the point of view of public regulation and supervision. The problem of code authority administration and the smooth operation of the price filing mechanism to the ends of publicity and of control are treated in Chapters III and IV.

III. THE LEGAL PROBLEM

Prior to the NRA the legal aspects of price filing were foremost in the public attention, to the unwarranted exlusion of many of its economic implications. Economic experience was limited, partly because of the questionable legal status of various forms of price filing, and the reluctance of industries to experiment or to invite public scrutiny to such experiments as were carried on..

But the legal problem is essentially secondary in origin and importance; it arose because the cooperative activity of exchanging market information was deemed to have resulted in certain instances in restraint of trade, such as was forbidden by existing law.

In none of the cases brought before the Supreme Court did the latter rule upon the legality of price filing as such, nor on specific elements of price filing plans. It has in every instance based its decision on the economic purposes and results attributable to the plan, with results that have been confusing and indecisive to the layman, and offer no rule-of-thumb methods as to the probable position of the courts if faced with other types of price filing plans, or the same kinds of plans operating in a different environment. One recent legal authority summed up the situation as follows:

> "It is the elimination of price competition, the curb upon freedom of individual action and the regidity introduced into the price structure which have induced the repeated adverse rulings of the court.....
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> **********
>
> "The Supreme Court has never categorically passed upon the legality of the separate elements of a complicated price reporting plan. It has not held that any single feature in and of itself is an unlawful restraint of trade. The component parts of the plan are but evidentiary of ultimate purposes and effects. The essential issue is whether the plan inevitably tends to or does eliminate price competition."(*)

Under such circumstances it would be distinctly useless to attempt to appraise the separate NRA price filing experiments in terms of the fragmentary precedents that have been sifted out of Supreme Court decisions in the past.(**)

These more or less defined legal restrictions on price filing were in abayance under the NRA code provisions. Every price filing provision introduced into a code represented, in one sense, a separate experiment in price filing legislation. These experiments lapsed legally with the termination of NRA. If continued in use they are liable to review by the Federal Trade Commission and the courts.

(*) Milton Handler, "The Sugar Institute Case and the Present Status of the Anti-Trust Laws", Columbia Law Review, January, 1936, pages 4,6.

(**) See page 14.

The demand for price filing under the codes and the insistence upon such regulatory features as the waiting period, indicate that business will probably be reluctant either to abandon those plans or to prune them for the dimensions of assured legality.(*)

This situation would seem to presage one of two possible developments:

(a) New legislation relative to price filing, or

(b) Modification of the present operative law concerning the practice, either through new test cases and new pronouncements of the courts, or new experiments under the auspices of the Federal Trade Commission.

The Fertilizer Industry included a price filing plan in connection with a voluntary agreement submitted to the Federal Trade Commissioner on Nov. 8, 1935. That plan has not yet been approved by the commission, nor has there been any definite indication of the attitude of that body.

The Sugar Institute Case, now before the Supreme Court,(**) offers an immediate opportunity to discover the present attitude of the Supreme Court, in that it calls for a separate court decision on the finding of the lower court that the price filing plan employed by the institute was in restraint of trade through the concerted action in the reporting and maintenance of prices and terms of current or future transactions. The imminent decision in this case obviates the necessity in this study for any extensive exploration of the trend of legal philosophy and technique in the consideration of price filing.

The decision itself may and should serve to answer many of the questions that have confused trade associations in the past, and offer positive guidance concerning the permissible forms of price reporting under the law, and the standards that the court will apply to determine the legality in any particular instance.

If the decision indicates that factual evidence of the economic and social results of price filing is to be considered as evidence of intent and incidence, and hence of legality, there will remain the necessity of formulating the tests to determine those results, and of providing some continuing administrative guidance for applying them to going open price plans. The significance of the decision in this instance has been excellently set forth by Milton Handler, in the article previously referred to:

"The court has two functions to serve in these cases: (1) It must determine whether there has been any transgression of the statute; (2) It must formulate economic policies regarding the

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(*) Some form of open price filing provision was incorporated in 444 codes and supplements out of a total of 751 approved to April 25, 1935.

(**) See above page 22 for description of the case.

> future, consistent with the basic purposes of the statute to be in effect until Congress acts. It is idle to argue the desirability of the court's exercising the second function. The fact is that it does. It is not enough for it, sitting as a trier of the facts, to find that a plan does not reasonably restrain competition. Such a finding necessarily places a stamp of approval upon the industrial plan in question. Consequently if a program involving future prices is ever sustained,-it is not entirely clear that it should be--the minimum safeguards upon which the court should insist are: (1) the use of an impartial and disinterested clearing house, and (2) full public disclosure of all statistical reports. There is precednet in the Appalachian case for qualifying approval of conditions designed to protect the public.(*)

It is apparent that whichever attitude the court takes, the decision is apt to be only a prelude to further action in the direction of regulation by legislative action. A relaxation of the anti-trust laws, such as would be entailed by approval of future price reporting, would create the need for effective public supervision such as was deemed necessary in the Applachian Case. In that case responsibility for exercising this supervision was lodged with the lower court, but, as, Mr. Handler points out, it would be entirely impractical for the courts to carry such responsibilities in the event of any general adoption of cooperative devices, such as future price reporting. Such increased responsibility would entail the delegation of supervision to existing administrative agencies or the creation of a new agency.

A blanket condemnation by the court of cooperative activity, such as that of the price reporting plan of the Sugar Institute, would doubtless create a prompt demand for modification of the existing anti-trust laws by legislative action and would create a similar need for public supervision.

Since the legal status of price filing is thus susceptible to alteration with comparative ease--witness the hiatus between conflicting decisions of the cases considered above, (**) and the vastly altered status of such plans under NRA codes, it has seemed more profitable to focus this study on the economic and administrative, rather than the legal, problems of price filing. The judgement as to whether practices and their effects are or should be made legally acceptable can well await the consideration as to whether they are economically sound and socially desirable.

The price filing study of NRA experience offers the best opportunity to date to test with objective evidence some of the tentative working assumptions of the courts about previously tabced forms of price filing,

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(*) Handler, Op. cit., page 8.

(**) Page 14.

and their incidence on prices and on competitive relations, and to define so far as possible the relationship of these price filing devices to other combinations of trade practices and to varying patterns of industrial organization and control.

CHAPTER III

PUBLICITY UNDER NRA PRICE FILING PLANS

The single requisite of the publicity function of price filing is the collection and dissemination of price information. The primary objective involved is an expansion of the knowledge of the prices among competing sellers and buyers. This conception of price filing was basic with Eddy and generally has formed the basis of the formal expositions of the theory of price filing by its advocates in industry and by others. However, it represents only one of the two main functions of price filing under NRA codes. The control function of price filing is discussed in Chapter IV below.

It is the object of this chapter to consider the publicity aspect of price filing experience under NRA codes. It is extremely difficult in most codes to isolate entirely the operation of this function of price filing. In many cases the elimination of seller or buyer ignorance of prices was not the main or even one of the express purposes of price filing. An exposition of the nature and extent of publicity realized under the codes must, however, include both the cases where this end was uppermost and the cases were it was only incidental.

The record of experience available is confined for the most part to the 57 industries included in the sample as explained in Chapter I above. However, there will be occasion to refer to the experience of other industries.

Publicity through price filing is a composite of many variables. Among the variables conditioning the relative degree of publicity as between different industries, the following are most significant: (1) type of information publicized, such as net prices, prices and trade discounts, or prices and some or all of the numerous supplementary terms and conditions of sale; (2) types of products about which there is publicity; (3) kinds of transactions with buyers about which there is publicity; (4) extent of participation in filing by competitors; (5) manner and extent of dissemination to sellers; and (6) manner and extent of dissemination to buyers. This chapter represents in large part an effort to summarize the code experience with respect to each of these variables. Under each is discussed the significant issues as they arose at the time of the writing of codes and later, the code requirements, the administrative modifications of the code requirements, the degree of performance in relation to requirements, and the reasons for non-performance. The material is organized under two main headings as follows:

I. Collection of Price Information Under NRA.
II. Dissemination of Price Information Under NRA.

Before undertaking the discussion of the nature and extent of publicity achieved under the codes it is essential to examine the function of publicity as conceived and expressed by code proponents.

I. FUNCTIONS OF PRICE PUBLICITY AS EXPRESSED BY CODE PROPONENTS

An examination of the ends which publicity was expected to accomplish constitutes a logical starting point for the development of its study. This embraces the stated objectives of publicity; and evidence thereupon is drawn from expressions about the problems which, it was hoped, publicity might solve and from the anticipated results of publicity. In most cases the statements referred to "price filing" and not to price "publicity"; it was seldom apparent, therefore, whether the results were expected only from the publicity afforded or also from the exertion of some type of control which was either an integral part of the price filing system or supplementary to it. Unless the expressions themselves or their context were such that it is evident that the control function was specifically in mind, the following analysis proceeds upon the assumption that price filing and price publicity were identified in the mind of the author of the expression. This is not entirely a realistic procedure, as the results will indicate, and naturally qualifies conclusions arrived at.

One significant finding may be recorded at the outset. In many industries the price filing plan was put into the code with little or no discussion at the hearings about the reasons for including the plan or the objectives which proponents hoped to achieve. In other cases, the need for and justification of a price filing system were phrased in such general terms as to throw no light upon the specific objectives which proponents had in mind. Likewise, it is reasonable to assume that in some cases the formal statements made served merely as window-dressing to conceal other expected functions.

The statements made by the spokesmen of various industries varied widely in their wording and in the extent to which they were general or specific. It is possible, however, to distinguish four main functions to which the statements, with variations, were addressed: (1) the maintenance of the price level; (2) the elimination of secrecy in business practices; (3) the elimination of discrimination; and (4) the advancement of buyer knowledge.

A. Maintenance of the Price Level

1. Blanket Statements

A number of the discussions attributed an influence over the price level to price filing without explaining in what way this would work out. The most common claim of these broad statements was that price filing would "stabilize prices" or end "destructive price cutting." In some instances it was clearly stated that publicity alone would achieve this result; in others, it is not entirely apparent whether the proponent was thinking exclusively of publicity or of the combined effects of publicity and control measures; and in still others, it is obvious that control measures were uppermost in the mind of the proponent. The latter statements are not included here. According to the statements made, it is evident that some code proponents believed that mere knowledge of the prices being quoted by competitors would in some fashion exert certain influences over the level of prices.

As an example of the blanket statements, there may be cited a brief filed by the code authority of the folding paper box industry in which it was stated that:

> "An open price plan adaped to the needs of this industry is essential if the conditions of vindictive price cutting and destructive competition which existed in the past shall be avoided in the future. . ." (*)

Likewise, the chairman of the code steering committee of the metal window industry stated at a public hearing that the filing provisions of the code "are intended as a temporary means of eliminating the ruinous price-cutting tactics so prevalent (in the industry)." (**) The function of stabilizing prices or stabilizing the market was claimed by representatives of various industries without elaboration of what stabilization meant or how price filing might achieve it.

Where the elimination of destructive price cutting was the express object in securing price publicity, it is clear that the proponents thought of publicity in terms of maintaining prices at more "profitable" levels. But precisely what was meant by "stabilization" is less clear. Stabilization, strictly defined, means the smoothing out of fluctuations upward and downward from some kind of a form. Perhaps proponents would accept that definition from a long time point of view and contend that their proposals were for the purpose of smoothing out the downward fluctuations. But from a short-run point of view, it is probable that, where publicity was sought as a means of effecting "stabilization", it was not solely for the purpose of eliminating short-term fluctuations in prices, but also for the purpose of maintaining them at a level higher than that at which they would be in the absence of publicity. As pointed out, however, it was not indicated in many statements how this alleged relationship between publicity and maintenance of prices would work out.

2. Elimination of Panic, Uncertainty and Suspicion

Among the expressions which advanced some explanation of the possible relationship between publicity and price movements a common one was that which contended that knowledge of competitors' prices would remove uncertainty, suspicion, and panic, and that the result of this would be to check the headlong fall of prices. Sellers hearing wild rumors of price cutting by competitors might in turn lose confidence in the situation and recklessly slash their own prices. Factual knowledge of precisely what the price policies of competitors were, it was claimed, would alter this fear induced by psychological factors. And, as a net result, the price situation in the industry would be much firmer. Thus the secretary of the marking devices code authority stated that:

(*) Brief dated January 10, 1935; (In NRA Files).

(**) Transcript of Hearing, October 11, 1935, Metal Window Industry, p. 10, NRA Files.

". .The real benefit of this publicity about prices is the banishment of Fear and Ignorance regarding your Competitor's Prices. If he intends to quote a price lower than yours, at least you know his talent, and further, you know just how low his quotation will be. You do not feel forced to make a blind guess at his price and probably overshoot the mark." (*)

The same tenor may be noted in the speech of the Executive Director of the Fertilizer Trade Association made at the price hearings held by NRA in January, 1935.

3. Elimination of Indirect Concessions.

Another argument occasionally advanced in support of the effectiveness of price publicity as a means for maintaining prices was that the publicity thus given to various types of secret concessions would actually end the granting of such concessions. This point of view assumed that the granting of certain types of secret rebates, secret services, or secret discounts would not bear investigation, and that the prospect of publicity would entirely discourage sellers from rendering them - possibly because they would expect sellers to meet them promptly. Since these concessions amounted to a cutting of the final net price to the customer, their abandonment would tend to bolster up the price structure as a whole. Closely related to this line of reasoning were arguments that the required filing of all of the various obscure methods of influencing a sale, even though not as a rule done secretly, might result in effecting their discontinuance. Thus, the President of the Copper and Brass Mill Products Association argued for the filing of prices paid for scrap bought from customers on the grounds that otherwise it would be used as an indirect method of price cutting.(**)

It was occasionally claimed that if members were required to file information about premiums or other free goods given, the effect would be to lessen the amount actually granted. Such charges, of course, exert a strengthening or "stabilizing" influence over final net prices.

4. Protection from Misrepresentation of or Coercion by Buyers.

Another way in which it was argued that price publicity would serve to maintain prices was by providing protection from various misrepresentative or coercive activities of buyers which often drove prices down. One type of such activity frequently mentioned is described by a traditional phrase--the "lying buyer." The complaints were that buyers went from one seller to another, misrepresenting the price quoted to them by other sellers; the sellers, thinking to meet competition, lowered their own price to meet the fictitious price, and as a result prices were forced to lower levels. Price filing, it was claimed, by furnishing knowledge to sellers of their competitors' prices, would supply an immediate means of checking the accuracy of statements by

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(*) Letter to members of industry, Nov. 2, 1933. (In NRA Files)

(**) Transcript of Hearing, Aug. 31, 1933, Copper and Brass Mill Products Industry, NRA Files.

buyers. Accordingly, the practice would be stopped at once. A brief submitted by the code authority of the folding paper box industry in support of a price filing plan ointed out that:

> "This condition made the industry a victim of rumors and misleading information arising between buyers and salesmen, and the absence of known market levels resulted in a condition of uncertainty and the complete lack of factual information existed to such a degree that many shrewd buyers developed a condition where the members of the industry were competing only with themselves, and often at prices below cost." (*)

Likewise, a spokesman for the paper distributing trade pointed out in the public hearing preceding approval of the code that price filing would protect:

> ". . .members of the trade from unscrupulous buyers who may play one member of the trade against the other in an attempt to break down the whole price structure. We have had buyers go to the extreme of sending themselves telegrams purporting to come from a competitor of ours, quoting conditions of sale which were fictitious, misleading and dishonest. We have had buyers change the written quotations of our competitors, in order to mislead our salesmen that there were better terms and conditions than actually existed. I could go on and name many more such unethical methods used by purchasing agents to tear down a trade. I am sure we are all familiar with many of them." (**)

The proponents in some cases claimed that price publicity might further end the practice of buyers playing one seller against another, even if the element of misrepresentation were absent. In a few instances, it is at least implied that price publicity would afford some protection against the bargaining power of very large buyers, who were previously able to obtain contracts at extremely low prices because of the size of their purchases--prices so low as to cover little more than variable costs. Price publicity might accomplish this end, it was inferred, through providing a united front where there would be no uncertainty as to what competitors were doing. The "shopping" of buyers, they reasoned, was possible only because the competing officers of sellers were never directly focused against each other. Price filing, by setting up openly announced schedules of prices to which members engaged to adhere, might encourage sellers to resist efforts of buyers to bargain at a lower price and discourage buyers from trying to do so; for sellers would know at all times precisely what the pricing policies of their competitors were. The version of this practice which appeared in the construction industry was known as "bid shopping". It was particularly troublesome there because of the widespread use of the sealed bid method of selling. Spokesmen for that industry proposed a method of bid checking as a substitute for price filing, due to the peculiar nature of quoting methods, in order to

(*) Submitted Jan.10,1935; (In NRA Files)
(**) Statement by L.B.Major, Transcript of Hearing, Sept.28,1933, p.101. NRA Files.

secure protection from these practices of buyers.

A statement by a representative of the candy manufacturing industry at the pre-code hearing illustrates the expressions regarding this protection against bid shopping by large buyers. He stated that:

> "by 'large buyers' is meant chain store buyers of large mail order house buyers. These buyers are the principal beneficiaries of secret prices. These buyers under existing conditions obtain price quotations generally and under the present plan of secret price quotations they have opportunity to bring pressure to bear on competitors for the purpose of forcing prices down regardless of economic justification therefor. Such buyers may do so directly or indirectly. The usual method employed by them is to inform the seller that his price is out of line. . . .The secret price quotations enable the buyer to force the prices down whether honestly or dishonestly to the detriment of the entire industry. The secret price quotations operate very much on the line of a gambling game with marked decks and the cards are always stacked against the seller. The seller does not know his competitor's price and depends solely on the information he receives from the buyer. In other words the secret price quotations create what is known as a buyer's market. Merchandise is not sold according to its cost of production and distribution but is sold at a price set by the buyer." (*)

Price publicity was urged by him as a means of eliminating this situation.

Among the more elusive lines of reasoning implied in some of the claims made for publicity as a stabilizing device was that some price-cutters simply did not know better. Smaller members, not knowing accurately their own costs, might through full knowledge of competitor's prices conclude that they were selling too low; or the price cutter might not be willing to incur the ill will of his fellow competitors, which he might feel as a result of dissemination of price reductions. Or, an incipient follow the leader policy might be much strengthened by publicity; the leaderless members, formerly addicted to price cutting, might desist as soon as the prevailing price was shown to them through the medium of price publicity.

B. Elimination of Secrecy in Competition

The feature common to all of the other statements regarding the functions of publicity, so far as sellers were concerned, was their emphasis on the fact that publicity brings competition out into the open and eliminates secret and uninformed competition. As contrasted with the above when the effect of the elimination of secrecy upon price

(*) Transcript of Hearing, March 13, 1934, pp. 262 et ff, NRA Files.

movements was recognized, in these statements the substitution of open for secret competition was set forth as an independent end. The variations noted below all represent different ways in which this general objective was stated.

1. Elimination of secret concessions.

The most common statement of this function appeared in the assertion that price filing would end the practice of secrecy in the granting of price concessions of one sort or another, especially of rebates. This practice has long been regarded by many business men not only as uneconomic but also as somewhat unethical because of its vicious and underhanded nature. Business custom has tended to stamp it as a practice beneath the dignity of an honest business man. To be sure, on the economic side it represented a form of price cutting which proponents might wish to check. But greater emphasis has been laid on the secrecy and deviousness involved, implying less objection to the concessions if made openly. Price publicity, its advocates urged, would end this underhanded method of doing business and so raise the standards of business conduct. Thus, the code authority of the vitrified clay sewer pipe industry stated that:

> "Replacing secrecy with openness tends to minimize deviousness and puts the purchase and sale of goods strictly on the merits of goods and services. Light destroys harmful bacteria in business and puts emphasis on health and efficiency." (*)

2. Making Competition More Intelligent

One somewhat general and vague, but nevertheless independent, function occasionally assigned to price publicity was that of making competition more intelligent. Without knowledge of competitor's prices, business men must make decisions more or less in the dark. With such knowledge individual decisions may be made on an informed basis and competition as a whole may become more orderly. The shift from speculative guesses to rational judgments, it was asserted, is one of the contribution of price filing. This argument is quite similar to the more specific arguments often advanced for the dissemination of trade statistics of all sorts as a means of aiding business men to plan for the future. Knowledge of production, stocks on hand, shipments, unfilled orders, etc., may be of great help to business men in planning their production and making committments for the future. Knowledge of prevailing prices of competitors has a far more tenuous connection with planning for the future. Probably these statements were concerned chiefly with the increased intelligence of business men in making decisions as to their immediate pricing policies. This is a different function from that of providing a guide to producers in formulating their long-run policies.

Those arguments for price publicity which cite as one of its functions the promotion of comparability of prices and terms belong to this same category. By bringing the prices and terms of each seller

(*) Brief submitted October 30, 1933; (In NRA Files)

into direct focus against those of other sellers, business men are enabled to compare item by item the variances as between sellers. Thus, all differences will stand out in clear light, whether they be of services rendered, or discounts or allowances granted or interest rates charged.

In defending price filing as a means of insuring intelligent management, a representative of the paper distributing industry stated that "it will permit members of the trade to compete intelligently in the light of all the facts. (*)

A spokesman for the Fertilizer Industry pointed out similarly that the purposes of including a price filing provision in the code

> "were to bring out into the open the prices and terms asked by different producers; to require each producer to issue a schedule and mail a copy to his competitors so that competitors can know what his prices and terms are at any given time....; consequently competition will be met with full knowledge of the fact." (**)

The executive director of the code authority of this same industry stated at the price hearings of January 9, 1935 that

> "Open pricing is a device whereby producer, distributor, and consumer may act intelligently in making business decisions, particularly as to all matters that involve price." (***)

Statements of similar import were made by proponents of a number of other industries. Their central theme is always, however, the increased intelligence which price filing affords to the conduct of business without specific indication, however, of the benefits expected to accrue from such.

C. Elimination of Discrimination

One of the functions most commonly assigned by code proponents to price publicity was the elimination or lessening of the amount of discrimination between buyers. Generally there was very little definition or clarification as to the exact nature of the practices which the proponent had in mind. From the viewpoint of buyers for resale or for furtherindustrial utilization, discrimination is objectionable because it means that certain of their own competitors are able to buy their merchandise more cheaply and accordingly are enabled to undersell all other buyers. Thus, whose who do not receive the lower and discriminatory prices have a direct interest in securing the equitable treatment of all buyers. Most of the statements, as made by code proponents,

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(*) Statement by L. E. Mahon, Transcript of Hearing, September 28, 1933, p. 101, NRA Files.

(**) Statement of A. B. Strobber, Transcript of Hearing, September 6, 1933, pp. 187 ff, NRA Files.

(***) Transcript, Vol. I, p. 131, NRA Files.

citing the elimination of discrimination as one of the major roles of price publicity, stressed the benefits which buyers would thereby receive. A typical statement was that contained in a brief submitted by the code committee of the machine tool and Forging industry subsequent to the public hearing on the code on October 2, 1933, which defended the price filing provision by stating that it:

> "assures to all the customers of the industry, exactly equal treatment in negotiation with a given manufacturer covering the prices, terms, and conditions of sale of the particular type of machine."

Aside from code proponents, the elimination of discrimination has long been regarded as one of the major contributions of price publicity by representatives of consumer interests, by organization of trade buyers and by non-partisan students of price filing.

A possible explanation of the importance which code proponents as sellers attached to this function of publicity is found in the fact that sellers often make price reductions to individual buyers which they would not be willing to make if it were necessary to offer them to their whole market. For a time after these reductions are made it may be possible to confine them to a few buyers. But eventually the pressure from other buyers may turn these limited reductions into general reductions. Thus, if in some fashion the entering wedge of early discriminatory reductions can be checked, a general reduction to all buyers may be prevented. Similarly, if one member discriminates between his customers, the competition of those customers receiving the lower prices with the distributors of other sellers of the industry may force the latter to reduce their prices. Thus, the sellers' advocacy of price filing because of its effect upon discrimination may be a matter of maintaining the industry price level.

Price publicity, according to its proponents, eliminates discrimination either by immediately discouraging sellers from further granting those concessions which will not stand the light of day; or by informing buyers for the first time as to the prices at which certain competing buyers purchase, so that they in turn may demand similar prices. Discrimination then may be ended either by the granting of similar low prices to all purchasers or by the withdrawal of the abnormally low prices extended to the few. It may make little difference to buyers - particularly those buying for resale or for use as raw materials - just what price they must pay, so long as they know that none of their competitors are paying less. This point of view has often been expressed by purchasing agents. (*)

It may be noted in this connection that certain classes of buyers opposed the mechanism of price publicity by means of which others hopes to end discrimination. The Mail Order Association of America

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(*) Letters received in answer to questionnaire concerning price filing and uniform bids; see Consumers' Advisory Board report, "Experience with NRA Open Price Plans, May 1, 1934, NRA Files.

in one connection stated that:

> "A confidential relationship is created when a retail merchant purchases goods from a manufacturer or dealer and business ethics and the welfare of industry and of general business require that the details of such transactions should not be made public, nor come to the knowledge of their competitors....(Price Publicity) simply places in the hands of the competitors information with which to embarrass and hamper the ordinary flow of trade." (*)

They proposed that the price filing plan be modified to provide for the exchange of price information only among manufacturers serving the same distribution channels.

D. Advancement of Buyer Knowledge

The other main function which it was claimed price publicity would perform was to make buyers generally more informed, so that they could buy more intelligently and not be mislead by inaccurate statements of competing sellers as to the selling prices of others. It was asserted that price publicity would make it possible for buyers to obtain at a given moment an over-all picture of the prices and terms of sale of all sellers. Again we find this point being advanced by industry proponents. Thus, a brief submitted by the cordage institute of the cordage and twine industry defended a proposed price filing provision by stating that it would "result in simplicity of comparison of conditions, enabling a consumer without difficulty to determine that quotation which is to his best advantage." (**)

The executive director of the National Fertilizer Association, in a statement at the price hearings of January 9, 1935, said that open pricing is a device whereby producer, distributor, and consumer may act intelligently in making decisions. Again, consumer representatives and impartial students have long recognized that the dissemination among buyers of the information assembled in price filing plans would make them more skillful buyers and enable them to obtain greater value for money expended. This is especially true of relatively smaller buyers; large buyers, such as federal or state agencies or very large corporations, have the resources necessary to acquire a complete picture of the price situation in an industry themselves. The small buyer on the other hand may have great difficulty in assembling by himself the necessary comparative information and must rely upon the statements of a few sellers with whom he comes in contact.

It is obvious that neither of the functions discussed immediately above - elimination of discrimination and advancement of buyer knowledge, have any meaning unless widespread dissemination to customers is included in the price filing plan.

(*) Volume B-2, document by O. M. Kile: (In NRA Files, Cordage and Twine Industry).

(**) (In NRA Files, Cordage and Twine Industry), Volume B-2.

II. COLLECTION OF PRICE INFORMATION UNDER NRA

Price filing in which publicity is an avowed purpose consists of two processes. The first includes the collection or assembling of data by some agency; the second includes the dissemination or distribution of the data by this agency. The adequacy of codal and administrative requirements is pertinent to both phases. But the success of the first depends ultimately upon the actions of industry members and their performance in accordance with these requirements whereas the success of the second depends upon the performance of the central agency. This section is concerned with the first process and accordingly is confined to a consideration of matters relating only to the collection of price information.

The subject is treated under the following main headings:

A. Agency of Collection
B. Participants in Filing
C. Types of Information Included
D. Types of Products Included
E. Types of Transactions Included
F. Geographical Scope and Other Geographical Factors
G. Physical Mechanics of Collection
H. Adherence to Filed Prices

Discussion under each of these headings has, when possible, been organized around the following points: controversies and the issues reflected; code requirements; expansion or modification of code requirements by code authority or industry vote, together with pertinent NRA action thereto; performance by members in compliance with codal and administrative requirements, and reasons for non-performance; and significant principles emerging from the discussion.

The codes of fair competition contained the enabling provisions under which the price filing systems were established and provided the framework within which they were supposed to operate. They also sought to establish the limits of administrative discretion. Since, in practice, many of the price filing systems developed in a manner not contemplated by the codes and since the inability to include all details involved in the administration of price filing left a certain field for justifiable administrative discretion, a restatement of code provisions does not throw great light upon what actually took place. However, it does indicate upon what matters industry and NRA agreed as of the time the code was approved, and sets forth the mandatory rules under which price filing was intended to operate. The administrative rulings took the form of expansion of code provisions either in connection with certain discretionary functions specifically delegated by the code or in connection with certain procedural and other matters upon which the codes were silent; or they were designed to modify the original code provisions after problems developed which were not foreseen or adequately provided for when the code was written; or when the code authority or industry regarded a change from the code provision as desirable.

Though a discussion of codal and administrative requirements should reveal the actual plan of collection as eventually set up by the administering agency, it does not ordinarily do so. Only where general compliance

was good, do they throw light on the question; for performance then would approximate the announced requirements. To the extent that this is true, an analysis of administrative requirements serves as a substitute for a prolonged and detailed analysis of actual price filings, for the purpose of obtaining information as to performance upon the aspects of price filing enumerated above. The evidence available for the sample as a whole, which deals with what industry members actually did under price filing, is largely confined to the questions of whether they filed at all and whether they adhered to their filed prices. Evidence bearing upon the more detailed matters of nature and extent of information filed, products included, transactions filed, etc., is far more fragmentary except in the industries for which intensive statistical studies were made. In cases where such detailed information is lacking but where general compliance with respect to filing and adherence was good, it is fair to assume that the actual performance approximated the codal and administrative requirements established.

A. Agency of Collection

1. Issues and Controversies

The central agency with which filings were made occupied an important place in the scheme of publicity, for a great deal of success of the plan was dependent upon the technical proficiency with which the agency set up and put into operation a workable plan, handled the mass of information as it came in, and organized it in intelligible form for dissemination. An incompetent or diffident agency might defeat the objective of price publicity irrespective of how well the members cooperated. The problem was essentially one of administrative detail rather than of technical statistical method such as might have been the case where trade statistics are filed instead of prices only. In addition to possessing the necessary administrative qualifications, it was of course, necessary that the agency itself be sincerely interested in furthering publicity and that it not regard publicity as incidental to or a necessary evil accompanying other functions of price filing. There was little discussion regarding the technical qualifications of a central agency during the period of code writing and no particular policy was ever formulated by NRA upon the point.

Considerably more discussion took place on the matter of the impartial and confidential character of the central agency. Fairness requires that the publicizing of information filed be accomplished simultaneously for all members. If one or a few members receive the benefits of price publicity before the others, they receive obvious competitive advantages. This means that the character of the agency should be such that filed information is not available to any members of the industry before it is available to all. This issue did not crystalize to any degree during the early period of code formulation. Some protests were made, however, at this early date by non-members of trade associations which were designated by the code authority and thus the central agency for price filing.(*)

(*) See Code History of Gas Appliances Industry, pp. 7-9; such complaints were also made by the circular knitters in the underwear and allied products industry and by members of the Carbon Dioxide industry who did not belong to the Carbon Dioxide Industry.

These protests, however, did not generally question specifically the intent of the trade association to release prices to its members prematurely, but laid greater stress upon the dominating position of the association in the industry and the possibilities of control resulting.

The other issue involved in the establishment of the agency of collection was whether regional agencies should be established. Where there were a large number of small producers scattered over the entire country, and where the competitive market of each was localized, it was felt that regional agencies receiving from and disseminating information to members in a given district would prove more efficient. (*) In other industries with fewer members, those members who were located at a considerable distance from the central office occasionally requested a separate agency for filing purposes; that was particularly true in the case of Pacific Coast members.(**) The time involved in sending reports across the continent to a New York, Washington, or other Eastern office and then in receiving them from the East was claimed to place them at a substantial disadvantage. This request was frequently opposed, however, by other members who wished to maintain the entire industry within the scope of a single filing system.

2. Code Requirements

Of the total of 444 codes which contained price filing provisions, about three-fourths named the code authority of the industry as the agency with whom members were to file their prices.(***) Part of these provided that the code authority might, if it chose, designate some agency other than itself for this purpose. In an important part of this group the code, at the same time, designated the existing industry trade association as the code authority. Most of the remaining fourth of the codes required that the central agency be an "impartial and confidential" agency. No elaboration of the qualifications necessary to make the agency impartial and confidential were customarily given. Seven of the codes themselves designated the agency to serve in that capacity. Sixty-five of the others provided that the code authority should select the agency thus specified, or if it failed to do this, that the NRA should make the selection. In twenty-nine codes the code authority alone was given the responsibility of selecting the impartial agent.

Twenty-two codes provided that price filing should be handled by regional agencies. The following codes among others contained such a

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(*) E. g., See Bulletin to Members of Mayonnaise Code Authority from Managing Agent, April 20, 1934; (In NRA Files, Mayonnaise Industry.)

(**) Minutes of Code Authority of Structural Clay Products Industry, March 12, 1935; in NRA files, Also, Resolution of Code Authority of Agricultural Insecticide and Fungicide Industry, February 20, 1935.

(***) See tabulation in Appendix C, Exhibit II.

provision: Baking, Bottled Soft Drink, Gypsum, Lime, Crushed Stone, Structural Clay Products, Vitrified Clay Sewer Pipe, Clay Drain Tile, Bituminous Road Material, and a number of the codes for the wholesaling and retailing trades.

3. Agency of Collection Actually Established

In forty-six of the fifty-seven industries studied the codes required that prices be filed with the "code authority". In ten of these, national code authorities (as distinguished from trade associations) were established which functioned as price filing agencies. These industries and the agencies which received and disseminated the filings were as follows:

Industry	Agency
Business furniture	National Emergency Committee--executive sec'y
Canvas goods	Canvas Goods Industry Code Authority
Coffee	Coffee Industries Committee
Cordage and twine	Cordage and Twine Code Authority--managing director
Funeral supply	Funeral Supply Code Authority--secretary
Macaroni	Macaroni Industry Code Authority
Scientific apparatus	Scientific Apparatus Code Authority
Shovel, dragline & crane	Shovel, Dragline and Crane Code Authority--chairman
Valve and fittings	Code Authority for Valve and Fittings Manufacturing Industry
Wood cased lead pencil	Code Authority for Wood Cased Lead Pencil Manufacturing Industry

In addition, in five industries the national code authority appointed regional agencies to handle filings which were either regional code authorities or agents other than "confidential and disinterested." These industries were crushed stone, ready mixed concrete, retail monument, salt producing, and wholesale confectionary. In the baking industry, members were instructed to file two copies of price lists with the regional agency, one of which was sent to the National Bakers Council, the national code authority; if no regional agency was set up in any region, filings were to be made directly with the National Bakers Council.(*) Thus in sixteen of the industries studied, prices were filed as the code required with the newly formed agency set up to administer the code.

In seven industries in which the code named the code authority or some agency designated by it as the filing agency, distinctly different types of agencies were actually set up. In four of these, folding paper box, floor and wall clay tile, envelope, and the kraft paper and sulphate board divisions of paper and pulp, the firm of Stevenson, Jordan ahd Harrison served as the central filing agency; this is a firm of management engineers.(**)

(*) Letter from Eugene Lipp, Acting Chairman of National Bakers Council, to members of industry, July 9, 1934; in NRA files, baking industry.

(**) See Chapter IV, p. 320ff for a partial account of the activities of this firm in connection with price filing.

In the gas appliance industry, the agency selected was the firm of Frazer and Torbet, certified public accountants, whose officers served as executives of the code authority although they were not members of the industry. The candy manufacturing industry selected Dun and Bradstreet as the central agency to receive and distribute filings. Reference is made in the structural clay products files to filings with the Consolidated Filing Bureau, Inc., of Cleveland but the nature of this agency is not clear from available materials.

The type of agency most commonly set up as the filing agency in the industries studied in 23 of the 57 codes was the trade association. In most cases this was contemplated in the code where the association was specifically designated as the price filing agency or was named as the code authority, which in turn was so designated. In a few instances prices were filed with the trade association although the code did not clearly designate it as the code authority.

Industry	Association
Agricultural insecticide & fungicide	Agricultural Insecticide & Fungicide Institute
Asphalt shingle & roofing	Asphalt Shingle & Roofing Institute
Carbon Dioxide	Carbon Dioxide Institute (first part of period)
Carpet & rug	Board of Trustees of Institute of Carpet Manufacturers of America
Cast iron soil pipe	Cast Iron Soil Pipe Association--secretary
Copper & brass mill products	Copper & Brass Mill Products-Executive Committee
Electrical manufacturing	National Electrical Manufacturers Ass'n. and subordinate supervisory agencies
Farm equipment	National Association of Farm Equipment Manufacturers and its successor, Farm Equipment Institute
Fertilizer	National Fertilizer Association
Fire extinguishing appliance	Chemical Fire Extinguisher Association
Ladder	American Ladder Institute--board of trustees
Machine tool & forging	National Machine Tool Builders Association-executive secretary
Mayonnaise	Mayonnaise Institute
Marking devices	International Stamp Manufacturers Association
Metal window	Metal Window Institute
Nottingham lace curtain	National Association of Lace Curtain Manufacturers
Paper & pulp	Subordinate associations of American Paper and Pulp Association
Plumbing fixtures	Executive secretary of the four constituent associations
Rubber manufacturing	Rubber Manufacturers Institute

Set up paper box	National Paper Box Manufacturers Association-executive committee
Steel castings	Steel Founders Society of America
Tag	Tag Manufacturers Institute
Underwear & allied products	Underwear Institute

Six of the industries examined were required by their codes to set up "confidential and disinterested" agencies for filing purposes: builders supplies, carbon dioxide, cement, copper, industrial alcohol, and lime. In two of these, builders supplies and lime, such agencies were to be regional. In the builders supplies industry, the national code authority instructed its local representatives that local filing agents must not be members of the trade, and that where the local representative himself was a member, he must designate some one else as agent.(*) The chairman and secretary of the national code authority designated themselves as filing agents for certain territories, although presumably they were members of the trade. (**) In the Carbon Dioxide Industry, where the requirement of a confidential agent was set up in an amendment incorporating Office Memorandum No. 228, (***) the code authority proceeded to appoint the president of the Carbon Dioxide Institute as the agent. In the cement and industrial alcohol industries, the filings seem to have been mailed to the office of the code authority; information is lacking as to what segregation was made of the confidential agent function and other code authority functions. Prices were filed in the copper industry with the Sales Clearing Agent, Mr. R. R. Eckert, who also administered the sales quota provisions of the code. In the lime industry, where filing was on a regional basis, local confidential agents were selected by the district control committee in each region.

4. Performance By Agencies

Detailed evidence bearing upon the degree of technical proficiency achieved by the various agencies is lacking. Without question there were wide differences between the efficiency with which price filing systems were operated as between industries. Some agencies aggressively faced the problems of setting up an efficient and smoothly operating system while others made little or no effort to effect some degree of organization made desirable by the immense amount of data that had to be handled. (****) The problems involved centered around such matters as instructions to members regarding mechanics of filing, classification

(*) Code Authority Bulletin No. 2, To All Code Authority Representatives and Filing Agents, November 9, 1934; (in NRA Files, builders supplies industry.)

(**) Report byAdministration Member C. S. Long to Deputy Administrator F. A. Hecht, December 10, 1934; in NRA files, builders supplies industry.

(***) See Appendix C, Exhibit V for content of this memorandum.

(****)For an example of inefficient administration, see the Code History of the Retail Monument Industry, p. 9 ff.

of products, uniform reporting forms, maintenance of files and the distribution of information. The difference between desirable efforts for the elimination of confusing and rulings which conceal some kind of control measure is very slight in many instances. But there is a considerable field within which a central agency may operate to produce a smoothly functioning mechanism for publicity without trespassing upon the questionable domain of price control. The fragmentary evidence yields the general impression that many of the agencies might have done a good deal more toward establishing an efficient system of publicity than they did. There is no doubt, however, that mechanical shortcomings of the publicity plans in practice were often due more to a lack of interest on the part of the agencies in the publicity function of price filing than to an inherent lack of ability. Protests from members that filings were never received or that they were frequently delayed in dissemination are examples of such short comings. (*)

The type of agency selected is, no doubt, an important factor in determining the technical success of the plan. The newly formed code authorities, which were engaged in administering and enforcing all of the other provisions of the codes, were frequently too pre-occupied with other matters to give adequate attention to the mechanics of the price filing plan; and in those cases where a member of the trade served as secretary and handled the price filings, little experience was brought to the job. From the single standpoint of technical proficiency, the old established trade associations brought to the task a high degree of organization and a staff trained in cooperative activities such as the price filing plan involved. The same observation is pertinent to firms of management engineers, such as Stevenson, Jordan, and Harrison. It was the other objectives beside publicity which certain trade associations and management engineers read into price filing which raised question about their usefulness as central filing agencies. The use of a qualified statistical firm, such as the candy manufacturing industry's selection of Dun and Bradstreet, assured an agency which was technically competent to organize and handle a price filing plan.

Although there is no positive evidence that discrimination was practiced in the establishment of priorities in the time of release of information as between members, in various industries the individuals who actually handled the filings were members of the trade and accordingly had advance knowledge of the prices reported by their competitors. This situation existed in the crushed stone, retail monument, builders supplies and shovel, dragline and crane industries, among others. It was thus possible for the filing agent or members of the Code Authority to use the information filed to their own advantage. Much opposition developed among members to filing in such instances and in some cases they

(*) See letter from National Foundry Co. to Ass't Deputy Freund, December 14, 1934, for complaint against the Code Authority of the Cast Iron Soil Pipe Industry that it delayed or failed to mail out price lists at all. Similar complaints from other members of this industry are in the files. Letters from members of the business furniture and shovel, dragline and crane industries attest to the same situation.

refused to file as long as the filing agent was one of their competitors.(*) In certain other industries, notably carbon dioxide, non-members of the trade association objected to filing with the association on the ground that it would be to their disadvantage.(**)

The discriminatory activities of central agencies in administering the publicity features of price filing were among the factors which promoted NRA to formulate a rigid policy, as of June 7, 1934, that prices should be filed only with a "confidential and disinterested agency." (***)

B. Participants in Price Filing.

1. Issues and Controversies

A central problem existing in price filing plans arises from the question as to what parties should file prices, once it is determined to establish price publicity for a given product. If participation is expressed in terms of "industry members", there remains the issue of who shall be regarded as industry members. Four main issues may be distinguished in the problem of participation which call for decision in the setting up of a price filing plan. The first of these is the question of whether all producers of a given product shall file prices or whether there shall be a selective plan in which some competitors are, for one reason or another, exempted. The second is whether filing of prices and general participation shall be mandatory for each member or optional only. The third is whether or not distributors of the industry should be required to file prices as well as the manufacturers. Finally, a problem appears where the products of certain producers fall chiefly in other industries but where a certain part of their products compete directly with the industry concerned.

Upon the first two points there was little argument or discussion during the code writing period. That the price filing requirements should apply to all members and that the participation should be mandatory was never subject to particular question.

A great deal of controversy occurred over the definition of enterprises which should come under particular codes, and the scope of the price filing requirements entered only as one of a number of considerations pertinent to the issue. Factors peculiar to each industry precipitated the discussion and determined the ultimate solution. It is

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(*) See Letter from administration member of Crushed Stone Code Authority to Deputy Janssen, October 15, 1934; in NRA Files, crushed stone industry. Also Minutes of Retail Monument Code Authority Meeting, November 24, 1934, p. 271 in NRA files.

(**) Report on Carbon Dioxide Industry, A. F. O'Donnel, Division of Research and Planning, NRA, May 1935, NRA files.

(***) Policy Memorandum No. 228; see Appendix C, Exhibit V. See Chapter VI, p. 461-474 for discussion of the application of this policy.

impossible to allude here to the issues involved in each of these discussions; the end result, however, was that the scope of the codes varied widely, some applying to a very broad industry definition while others applied to a very narrowly defined and circumscribed industry. These jurisdictional controversies over the scope of the codes presaged future problems as to the scope of the price filing requirements.

The issue as to whether distributors of the industry should be required to file under the same plan as that under which manufacturers filed reflected far more than a mere administrative problem. A number of industries claimed that the very success of any kind of price publicity was determined by whether or not distributors were required to file prices. This was most commonly asserted in industries where some of the manufacturers competed directly with jobbers and wholesalers. Advocates of the inclusion of distributors in price filing stressed the relation of this to the publicity function of price filing as well as the control function. Thus, the Mayonnaise Code Authority said:

> "We feel that there cannot be open price competition for a part of the Industry unless there is open price competition for all...The wholesaler can sell either at the manufacturer's own price or file his own price and such price becomes effective with the wholesalers. The sole purpose of the amendment to be brief is to establish open price competition all the way through, which we feel tends to carry out this provision of the act in all particulars." (*)

The requiring of distributors to file prices, according to one of the largest members of the same industry, the Kraft-Phoenix Cheese Corporation, was only designed

> "to carry to the logical conclusion this open price system. We want to know what jobbers, who are competing with us in selling to retailers or competing with our distributors in selling to retailers, have as a price." (**)

Efforts were also made by manufacturers to include distributors under the same code as themselves in order to bring them within scope of the price filing requirements and other code provisions. The distributors, on the other hand, were usually unwilling to file prices with any agency wherein they had no representation and were averse to coming in under the manufacturers' code. The NRA acceded to the wishes of the distributors in most of these early controversies and did not, as a rule, urge them to participate in the publicity plan provided for the manufacturers. (***)

(*) Transcript of Hearing on Amendment, statement by W. F. L. Tuttle, Managing Agent of Code Authority, April 12, 1935, p. 94, NRA files.

(**) In loco cit., p. 99.

(***) See Chapter IV, p. 272-313 for full discussion of this point from the aspect of price filing control.

2. Code Requirements

Mandatory filing by members of an industry was provided for in practically all of the 444 open price codes. Twenty-five codes provided that, in lieu of filing, a member might accept as his own the lowest price on file for other members. Among the codes containing such a provision were Iron and Steel, American Glassware, Folding Paper Box, Tag, Envelope and Glazed and Fancy Paper. All of the other codes made filing by the individual member obligatory whenever price filing was actually set up. Only three codes required that certain types of distributors file prices with the central agency of the manufacturing industry: the Agricultural Insecticide and Fungicide, Cork Insulation Division of Cork, and Piece Goods Selling Division of Wool Textile Codes required that members enter into contracts with their controlled sales representatives binding the latter to file prices with the industry agency. (*)

3. Code Authority Expansion or Modification of Code Provisions

Because of the fact that NRA price filing systems were typically mandatory, insofar as filing by individual members was concerned, the field for administrative discretion with respect to participants in the price filing was small. (**) That is, there was little range for exemption of members manufacturing a particular product. Consequently, in the code authority rulings examined, almost universally the instructions were that all members should file. In the case of four paper codes studied, Envelope, Folding Paper Box, Paper Distributing, and Tag Manufacturing, the code provided that members need not file their own prices if they chose to indicate that they would not sell below the lowest price on file for some other member. Thus, in a simple physical sense, the code itself permitted some members to abstain from filing their own price lists.

Asside from genuine members of the industry, the question of filing by certain non-members caused much difficulty. This was only a part of the larger and more fundamental problem of classification of members into industries for code making purposes. A non-industry member for example, might devote a small part of his efforts to producing goods classified under the industry in question. It was important to this industry that he file prices with them, since his product would be in direct competition with those of industry members. On the other hand, he was under the jurisdiction of another industry. This problem presented itself in the scientific apparatus industry among others and a ruling was obtained from NRA that non-members of the industry must file prices with the code authority of the industry if and when they sold industry products. (***) The problem became more complex when it was a question of substitute but not

(*) See Chapter IV, pp. 280-298 for discussion of other methods of securing filing by distributors.

(**) It should be noted that in some industries the only sanction applied to members who did not file was the withholding of price information filed by other members. Thus, in actual practice, these plans really operated as voluntary plans despite code provisions to the contrary.

(***) Memorandum from ass't deputy chief, Government Contracts Division, April 17, 1935; in NRA Files, scientific apparatus industry. See p. 280 concerning ruling that hardware wholesalers must file on farm equipment products.

similar products. Although this situation presented serious difficulties in establishing and effectively operating price filing systems, it was simply a part of the larger administrative problem of classification and jurisdiction faced in the administration of all trade practice and labor provisions.

Efforts were made by a number of code authorities of industries whose codes did not cover distributors to secure a ruling from NRA that distributors must file prices with them; this occurred in the floor and wall clay tile, mayonnaise, and vitrified clay sewer pipe industries among others. NRA generally refused to grant such requests, however, and many industries subsequently asserted that the effectiveness of their price filing system was seriously impaired thereby. (*)

4. Performance By Members

Evidence pertinent to the question of the basic participation in price filing, that is, the proportions of industry membership which filed some kind of information, is largely qualitative in character and gathered from a variety of sources. The evidence obtained permits a rough three-fold classification of the proportions of members of industries in the code sample who filed their prices at one time or another. The first group includes those industries in which almost all members of the industry had prices continuously on file for an extended period. On the basis of available evidence about one-third of the industries in the sample apparently fell into this category. The Code Authority of the Agricultural Insecticide and Fungicide Industry reported on May 8, 1935 that ninety-nine percent of the industry were complying while the status of the other one percent under the code was doubtful. (**) In the Fertilizer industry, where members exchanged prices directly, participation in such exchange of schedules was reported to be practically 100%. (***) The Administration Member of the Code Authority of the industrial alcohol industry reported to NRA on May 6, 1935 that all members of the industry had filed prices. In the minutes of a meeting of the machine tool and forging industry of October 3, 1934, it was reported that 259 out of a total of 272 members had filed prices. The secretary of the Code Authority of the Metal Window Industry reported in a questionnaire sent to him in January, 1936, that, while only 36% of the members of the industry (both by numbers and volume) filed during the first half of the code period, this grew to 100% in the second half. The administration members of the salt producing industry reported to NRA on May 15, 1935, that all members of the industry had filed prices. The Code Authority of the Scientific Apparatus Industry reported on December 7, 1934, about 95% compliance with the requirement to file prices. (****) The manager of the Vitrified

(*) Exceptions to this policy are noted in Chapter IV, pp. 278-281 and the significance of the problem from a control standpoint is discussed at length.

(**) Letter to C. N. Liqued, (In NRA files, agricultural insecticide and fungicide industry.)

(***) Memorandum from Simon Whitney Chief of Fertilizer Price Filing Study to L. Baird, January 13, 1934; based on statements of officers to National Fertilizer Association, NRA files.

(****) Letters to Ass't Deputy Hand; (In NRA files, scientific apparatus industry.) Repeated complaints that filings could not be obtained from resellers (supposedly subject of price filing) suggest that this estimate does not include all of these.

Clay Sewer Pipe Code Authority stated on November 27, 1934, that all members of the Eastern region had filed prices. (*) Almost all of the members of the copper and brass mill products industry filed prices with the exception of the New York distributors in the brass division. A high degree of participation was achieved in the various divisions of the paper and pulp industry excepting the tissue paper and bogus wrapping paper divisions. About all code members of the cordage and twine industry filed but eventually the competition from prison-made products and from the Philippines destroyed the effectiveness of price filing. (**) In the crushed stone industry, statements by twenty-one regional code authorities to NRA field staff members indicate that in all but two or three of these regions between ninety-five and one hundred percent of the members filed. Other industries in which practically all members filed prices were asbestos, asphalt shingle and roofing, cement, copper, electrical manufacturing (in divisions where established), farm equipment (***) mayonnaise, plumbing fixtures, (****), steel castings, lime, metal lath, nottingham lace curtain, and the mechanical rubber goods division of the rubber manufacturing. (*****)

Included in the second grouping of industries are those in which compliance with the requirement to file was substantial but only fair - where roughly from fifty to ninety percent only of the membership filed prices. About forty percent of the industries in the sample fell into this category. In the builders supplies industry a substantial volume of filings were received by the middle of 1934. After the issuance of Executive Order No. 6767 permitting quotations to governments at 15% below filed price, the code authority ruled that the code did not require price filing and returned all prices filed in an effort to end price filing; filing by members practically ceased thereafter. (******) In the baking industry an important share of the wholesale bakers filed prices but several stays postponed the requirement that retailers file; a considerable number of them did, however, continue to post prices as required. At one time during the history of the Business Furniture Code, as much as eighty percent of the membership filed, but the failure to secure approval from NRA of a resale price maintenance plan caused a progressive abandonment of filing. In the coffee industry, with a total membership of about twelve hundred, 1030 members filed one or more price lists, 601 members filed two or more, 287 filed five or more, and only 125 members filed 10 or more price lists during the year and a quarter of code operation.(*******)

(*) Minutes of regional code authority meeting; in NRA files for vitrified clay sewer pipe industry.

(**) Code History of Cordage and Twine Industry, p. 12.

(***) With the exception of independent wholesalers, nominally subject to the code. See Chapter IV, p. 280.

(****) With the exception of independent wholesalers, nominally subject to the code. See Chapter IV, p. 274.

(*****) Sources of information regarding percentage of industry filing prices in those nine industries were either the respective code histories or the verbal statements of NRA staff members who were in close touch with the industry during the code period.

(******) Code History for Builders Supplies Industry, Exhibit E therein.

(*******) "Price Control in the Coffee Industry," February, 1936, p. 53, (Trade Practice Studies Section, Division of Review), a study by Harry S. Kantor.

In the candy industry a report by Dun and Bradstreet, the central agency for that industry, for the three months period ending October 1, 1934, indicated that 457 members out of a total of 75[illegible] had filed prices. (*) Certain members of the carbon dioxide industry consistently refused to file prices with the carbon dioxide institute; the administration member in a report to NRA on April [illegible], 1935, estimated that eighty percent of the industry were willing to file prices.

In the envelope industry, a substantial part of the membership did not file prices of their own, but in accordance with the peculiar provisions of the code, they were automatically deemed to have filed the lowest price and the most favorable terms on file.

A brief filed by the Code Authority of the Folding Paper Box Industry on January 10, 1935, stated that 212 out of a total of 292 members were complying with the open price plan on made-to-order business. (**) The funeral supply industry first set up its plan on a national scale and received over 10,000 filings; it was then found administratively expedient to set up regional agencies with which large numbers of members continued to file. Roughly one-half of the gas appliances members filed prices during the latter half of the code period. A number of the smaller members of the ladder industry refused to file. A bulletin issued by the Code Authority of the Macaroni Industry on May 17, 1934, stated that 291 members had filed prices; the total membership of this industry was somewhat over three hundred. A questionnaire answered by the former secretary of the Code Authority of the Marking Devices Industry in January 1936 stated that, during the first half of the code period, sixty percent filed while during the second half of this figure rose to sixty-five percent. A considerable volume of filings was received in various regions of the paper distributing industry but since members could adopt the filed prices of others it is not possible to appraise accurately the degree of compliance. In the retail monument industry the degree of compliance with the filing requirement varied widely with regions but inspection of figures for different regions tends to confirm the reasonableness of the estimate of sixty percent quoted in the Code History. (***) A bulletin of the Code Authority of the Shovel, Dragline, and Crane Industry on October 30, 1934, stated that twenty-one out of a total of thirty-three companies had filed prices. Most members of the tag industry did not file prices of their own but were (according to the Code provision) deemed to have filed the lowest price on file. By February 19, 1934, 128 members out of a total of 247 members in the valve and fittings industry were reported to have filed prices. The refusal of circular knitters in the underwear and allied products industry to file prices decreased the compliance figures of that industry substantially. In the wholesale confectionery industry about 75% of the straight-line confectioners and about 50% of the allied-line confectioners were reported to have filed. (****)

In the third group, which comprises about fifteen percent of the industries in the sample, members did not file prices to any important

(*) Research and Planning Division of NRA, code administration report, April 1935, pp. 47-48 NRA files.

(**) The plan did not require filing on all transactions.

(***) P. 35

(****) Code History of Wholesale Confectionery Industry, pp. 35-36.

extent. In the canvas shoe industry, members of the wholesale division, fourteen in number, elected not to file prices at all; retailers, consisting of three thousand to thirty-five hundred members, made an attempt to operate their system but filed a small proportion of the total ever filed prices. The former secretary of the Code Authority of the Marble quarrying and finishing industry stated that price filing was never operative in that industry. (*) Relatively few of the 140,000 units in the Retail Tire and Battery Industry ever filed prices; filing was attempted in only a few of the metropolitan areas and only during a period of four months when the emergency minimum price was in effect. In the rubber footwear and heel and sole divisions of rubber manufacturing the smaller members of the industry consistently refused to file on the grounds that their customary differential under the selling prices of the better-known brands would soon disappear under price filing, thereby depriving them of their accustomed share of business. The failure of NRA to approve a mandatory cost estimating manual for the set up paper box industry, which was for a time in use in lieu of price filing, was followed by general non-observance of the price filing requirements. In the structural clay products industry lack of product standardization and failure of NRA to grant a zoning plan greatly retarded filing of prices. (**) A letter from the former secretary of the wood cased lead pencil industry on January 2 , 1936, states that participation in the price-filing system was negligible because of the failure of NRA to approve certain supplementary control provisions requested by the industry.

Scattering returns to a questionnaire sent to former secretaries of code authorities of industries whose code contained a price filing provision secured the following data for industries not included in the code sample.

(*) Bid filing was, on the other hand, well observed outside Metropolitan New York.

(**) Minutes of National Code Authority Meeting, March 8, 1934; (In NRA files structural clay products industry.)

Industry	% of Members Filing 1st half of Code period	2nd half of Code period
Asphalt & mastic tile	1[illegible]	100
Concrete mixer	9[illegible]	100
Household ice refrigerator	8[illegible]	15
Metal tank	65	85
Motor fire apparatus	78	90
Pulp & paper mill wire cloth	96	97
Sheet metal distributors	15	--
Talc and soapstone	80	16
Transparent materials	25	75
Warm air furnace	90	95
Water meter	100	100
Card clothing	1[illegible]	100
Slide fastener	100	100
Unit heater & unit ventilator	100	1[illegible]0
Commercial refrigerator	50	30
Boiler manufacturing	80	95
Cutlery, manicure implement, etc.	95	75
Cutting die	89	--
Perfume and Cosmetic	--	85
Power & gang lawn mower	80	80
Road machinery manufacturing	97	97
Tile manufacturing	81	81
Tool & implement mfg.	94	96

The evidence upon the extent to which distributors filed prices with the central agency of the manufacturers is most negative. In various industries where the codes provided that jobbers or other distributors file prices, such as asbestos, farm equipment, carbon dioxide and the automobile fabrics division of rubber manufacturing few independent and multiple-line distributors filed prices. Voluntary filing by distributors was achieved in few industries. In none of the twenty-five industries whose experience with respect to this point was included in the questionnaires returned was it reported that distributors filed prices with the industry agency. These remarks apply only to manufacturers' codes. It is apparent that price filing in numerous distributing trade codes covered the resales of many of these manufactured products.

C. Information Included in Filing

1. Issues and Controversies

The term "prices" when used in connection with price publicity is not a simple concept, as breif examination will make apparent. Instead of there being only one variable in the case of the price of a given product, actually there are a great number of possible variables all of which constitute a part of the actual price of the product. In the first place, different prices are charged to different types of buyers by one and the same seller. These may take the form either of net prices to each class or of varying discounts from a list price or a master or gross price list in use by the entire industry. In the second place, there are in any industry a great number of conditions of sale respecting which sellers can vary the favorableness of their terms. A change in any one of these affects to a greater or less degree the final net cost to the buyer and thus becomes a significant factor in price competition. Some examples of these supplementary pricing factors are quantity discounts, cash discounts, free credit periods, product guarantees, price guarantees, supplementary services rendered and allowances for services rendered the seller by the buyer. Without price publicity these supplementary terms of sale may remain relatively stable, so far as individual members and group practice are concerned, or they may serve as the most active regions of price change. Price filing makes changes in the nominal price a matter of more common and more prompt knowledge throughout the industry, so that members could, unless they were obliged to file such terms, resort to making one term after another more favorable to the customer in an attempt to find a tool of price concession which might be kept secret from competitors. Thus, theoretically publicity of prices requires that all of the supplementary factors be included within the scope of price filing.

The concrete problem, then, which faces those administering a system of price publicity is to design means of bringing all significant factors within the scope of the publicity plan. One element of this problem is the question of whether nominal prices shall be filed in the form of net prices or of discounts from a list price of some form. Another relates to the degree of detail necessary in order to make the filed information significant. A part of this, also, is the question of what types of information, short of everything, are most important. Finally, if it is deemed necessary to require the filing of all pricing factors, how possible is it to achieve this end? These are the important considerations in determining what precisely should be included in the filing of "prices".

No particular controversies appeared during the code-writing period with respect to the scope of price filing so far as information was concerned. In a few cases where the filing either of net prices or of list prices and discounts was made mandatory, members accustomed to quoting in other ways were not especially anxious to change to a new method. In many cases the immensity of the problem ahead, that of securing complete publicity of terms, was not fully realized at the time, and so the issues were not crystallized. In cases where it was realized, some members were dubious about the cost and effort

involved in reporting detailed information, and the complexity of the price files which would result was also a source of dismay. But in general, there arose very little opposition to the inclusion of all terms and conditions within the scope of the price filing plan. In some industries efforts were made to dispose of certain types of concessions as competitive factors by securing provisions in the codes either prohibiting certain concessions or limiting their amount. The NRA granted these readily in the case of a limited number of terms, such as cash discounts or rebates, but became progressively reluctant during the period of NRA to permit such artificial rigidities to be introduced into the price structure on any extended scale. (*)

2. Code Requirements.

The inadequacies of a scheme of publicity in which only nominal prices would be publicized was generally recognized in the codes, as is evidenced by the fact that only thirty-two of the 444 codes required simply that "prices" be filed. Even in these instances, informal code authority and NRA interpretations usually expanded this requirement to cover pertinent terms of sale. The remainder of the codes prescribed in either general or more specific terms for the filing of additional information pertaining to the individual pricing policies. Three hundred and sixty-two codes required the filing of "terms and conditions of sale" along with prices; in almost no case was there further elaboration of just what scope was intended. Two hundred and seventy-nine codes required the filing of discounts, ninety-six the filing of allowances and fifty-one the filing of rebates. Aside from these more general items, the following items were specifically included in the filing requirements of one or more codes; cash discounts, periods of free credit, guarantees, product guarantees, price guarantees, firm offers, money-back agreements, gratuities, premiums, sample policy, prizes, accessories included, any unusual services rendered, installation services, warehousing services, gifts, purchase of buyer's capital stock, commissions paid to buyers, trade-in allowances, advertising allowances, container allowances, cartage allowances, label allowances, form of contract, definitions of customer classes, classified list of customers, trade discounts, quantity discounts, equalizations of freight rates, prepayment of freight charges, freight allowances and freight terms.

Three codes left the decision as to what information should be filed entirely to the discretion of the code authority. In this connection, it should be noted that fifty-nine codes empowered the code authority to prescribe the reporting form to be used. In practice, at least, this privilege gave the code authority direct control over the types of information within the filing requirements.

As has been discussed elsewhere, the "prices" to be filed were almost without exception present or future prices. Only one code, that for cotton textile, provided for the reporting of past prices only. This is one of the important features in which price filing plans under NRA differed from those existing prior thereto.

(*) See further discussion, pp. 269-272 and 483-484.

3. Code Authority Expansion or Modification of Code Provisions

The types of price information which the administering agency, within the framework of code provisions, required to be filed influenced directly the effectiveness of filing as a means of securing publicity of the price structure. As has been pointed out, most of the requirements in NRA codes were very broad upon this point; this observation applies with equal force to the codes in the sample analyzed. By far the greater proportion of the codes in the sample stipulated that "terms and conditions of sale" should be filed. Some enumerated certain specific items in addition to prices that must be filed out such as discounts, quantity discounts, cash discounts, allowances, etc., and then added the catch-all phrase, "and all other terms and conditions of sale". In a minority the requirement was confined to the filing of "prices" and "discounts", while in one outstanding case, the Machine Tool and Forging Code, the filing of "prices" only was required. It is evident that in most of the codes the range of information required was almost unbounded.

An examination of code authority bulletins and letters to members indicates that in most cases the administrative instructions to members simply repeated the wording of the code. Members were instructed to file "current prices and terms of sale", or whatever phraseology the code had used, and presumably it was left to the judgement of the member to interpret these requirements. A number of the uniform reporting forms drawn up by code authorities contained large blank spaces lagelled "terms and conditions of sale" with no explanation as to shat should be covered there.

There were, however, noteworthy exceptions to this. Some code authorities specified a few items which they considered the major terms of sale and required their filing; cash discounts, quantity discounts, trade-in allowances, and transportation terms were common items thus specified. This specification was accomplished either in a bulletin of instructions to industry members or by including blanks so labelled on the uniform reporting form. A far more ambitious effort was made by certain other code authorities who found it advisable to require the filing of a very long list of specified terms of sale. Once embarked on such a program, it seemed to be necessary constantly to add new items to the list as members used new types of allowances, services, or credit terms to effect price concessions. The standard form in use at one time in the carbon dioxide industry contained blanks calling for the following information: terms, contracts, deliveries, country, territory, cylinders, freight equalization on full cylinders, freight on empty cylinders, privately owned cylinders, other equipment, cartage allowances, shipments on consignment, additional terms, description of free delivery zones, description of country territory and annual purchase volume of each class of buyer quoted. Bulletin No. 11 of the Macaroni Code Authority instructed members to file the following information: whether prices list or net, discounts for each class of buyer, delivery conditions, quantity discounts, territories to which prices apply, classification or grade of product, raw material used in each grade or brand of product and price thereof, separate price

for each style or brand of product, separate prices for each size of carton, case, or package, differential between wood box and corrugated package, and exact character and weight of package and number per case. Bulletin No. 2 of the Asphalt Shingle and Roofing Code Authority, in addition to a number of other items, required the filing of commissions paid, freight equalization, product guarantees, completing materials supplied without charge, time finance plans, and price guarantee policy in subsequent explanations on April 16, 1934, and June 4, 1934, they added among other items cooperative advertising plans, and free training of buyer's employees. The fertilizer and gas appliance industries provided other examples of such detailed instructions.

Efforts to influence the actual prices and terms of sale are a part of the problem of the control function of price filing which is discussed in Chapter IV. However, there are certain borderline matters as between these two functions which should be noted here. Certain types of requirements ostensibly concerned simply with furthering the ends of publicity may actually represent control measures. For example, the requirement that prices should be filed on a delivered basis, such as was made in the business furniture, crushed stone, sand gravel and slag, fertilizer, and funeral supply industries, among others, may exert extensive influence over the price level where shipping costs bulk large among the total costs of production and distribution.

About a third of the code authorities in the industries examined set up uniform reporting forms upon which members were required to file prices. Such forms have certain admitted advantages from the view point of mechanics; they facilitate physical handling by the central agency and by containing blanks to be filled out, they help insure that members will not neglect the reporting of desired items. But they can easily be manipulated in a way that is open to criticism. For example, members may thus be required to file prices by zones although such a procedure was not contemplated by code. Likewise, some of the forms set up in various of the paper industries contained in small print on the back a wide variety of regulations or "trade customs" to which members assented by using the form; these contemplated a uniformity of a wide range of selling practices which was entirely unauthorized by the code. Wherever such uniform reporting forms are used, they be subjected to careful scrutiny if they are not to include restrictive features that will serve to limit individual freedom in pricing practices.

Certain other variations may be noted at this point without being discussed in detail. Some code authorities insisted that net prices be filed rather list prices with discounts. On the other hand, in the metal windown industry a master price list was imposed upon the entire industry and accordingly it was required that only discounts from this list be filed. In the business furniture, copper and brass mill products and coffee industries, among others, the prices required to be filed were base prices, applying to certain base products and to stated base quantities; extras and deductions covering other products and other quantities were formulated by the code authority and used by the members in conjunction with base prices in computing their selling prices.(*)

(*) The control elements of such provisions is discussed in Chapter IV, pp. 231-242.

In some cases filing was accomplished simply by mailing a catalogue to the code authority. In the machine tool and forging industry, where a customary policy had been built up of quoting only one price to all buyers with no further discounts, only list prices were required to be filed. (*) Efforts made in some industries to secure the filing of costs in addition to or in place of price data are discussed in Chapter IV.

4. Performance by Members

A complete quantitative appraisal of the degree of performance of industry members with respect to the detailed aspects of information filed, is almost impossible. Such an appraisal would involve an inspection of the filings of each member, industry by industry, and item by item, which would be a monumental task even if all filings were available. In general, the codal and administrative requirements taken in conjunction with the general compliance data as set forth above throw the greatest available light on the question. Thus, in industries where general compliance was good, one could expect to find the closest correspondence in details between requirement and performance, so that the statement of requirements also indicates pretty well what was filed. However, there is presented below the fragmentary information available.

No generalization can be made regarding the precise form in which prices themselves were filed. In some cases net prices were filed for the different classes of customers and in other cases discounts; numerically the latter were more important. There would, at any rate, seem to be little deviation from the requirements set up on this point. There is considerable evidence that great difficulties were met with in attempting to have members file a substantial number of their terms and conditions of sale. In the electrical manufacturing industry such information filed was largely confined to cash and quantity discounts, with payment plans, trade-in allowances and delivery terms being included only in some few cases. (**) In the fertilizer industry considerably more success was obtained along this line, for a wide variety of terms, as prescribed by the code authority, were actually exchanged among members. (***)

In the gas appliances industry the information varied widely among members from very complete price lists to mere notices of change. (****)

(*) Bulletin No. 10, Supervisory Agency, February 28, 1934, To members of the Industry.

(**) Study by Albert Caesar, Price Filing in the Electrical Industry, Trade Practice Study Section, Division of Review.

(***) Simon Whitney, Trade Practice Studies Section, Division of Review, Fertilizer Industry Price Study, Dec. 15, 1935, P. 7

(****) Inspection of small sample of actual price filing of this industry in NRA files.

In the mayonnaise industry many of the discounts and terms of sale were omitted despite the instructions sent out. Many of the small members of the retail monument industry had never crystallized terms of sale into definite practice, a fact which made efforts to file their complete pricing policy difficult. The dissemination sheets of some divisions of the rubber manufacturing industry indicate that some members, at least, were filing changes in numerous and quite detailed terms of sale. In the shovel, dragline, and crane industry the administration member reported to NRA on December 21, 1934, that the majority were filing all of the types of information requested, including extras, deductions, special accessories, etc., but that the remaining minority filed the basic nominal price on a standard machine and nothing else. In the tag industry filing of component price elements and required adherence to the combined total of this "lowest prices and most favorable terms", resulted in the building up of very detailed and all-inclusive terms and conditions of sale mandatory upon industry members. This was not accomplished, however, by the filing of complete individual pricing practices. It was reported that filings in the vitrified clay sewer pipe industry were quite incomplete in many cases. (*) In the agricultural insecticide and fungicide industry, cash discounts, net due dates, and F.O.B. points were filed. (**) In the marking devices industry, the secretary reported in response to a questionnaire that no information was filed other than actual prices. The suggested cost and estimating manuals circulated to industry members indicated that little information could be conveyed by filing of nominal prices. (***)

A questionnaire sent to former code authority officials in January 1936 for industries whose codes contained price filing provisions supplies some evidence regarding the types of information filed by members in those industries. Reproduced below are answers to the question of the form in which prices were filed and the terms, conditions, and other information ordinarily filed:

Industry	Form of Prices Files	Information Filed
Paper & Pulp mill wire cloth industry A(****)	Net price (one price for all customers)	Cash discounts
	List prices with discounts	Down payment requirement Installment periods Discounts Special quantity discount

(*) Minutes of Eastern Regional Code Authority, February 12, 1935, in NRA files vitrified clay sewer pipe industry.
(**) Letter to C. Southworth from L. S. Hitchner, President, January 23, 1936, NRA files.
(***) See below, pp. 202-205.
(****) Requested that reports be confidential.

Industry	Form of Prices Filed	Information Filed
Water meter Mfg.	List prices with discounts	Cash discounts
Motor fire apparatus	List prices with discounts	Cash discount schedule quantity discount " trade in allowance " Deferred pay't "
Warm air furnace	List prices with discounts	Discounts Freight allowances Consignments "All" other conditions of sale
Metal tank	List prices with discounts of Discounts from Industry fross or master price list	Warranties FOB points Conditional sale terms Quantity discounts Freight equalization points
Industry B(*)	List price with discounts	Terms of contract Packing practice Delivery terms Terms of payment Charge for broken packages
Industry C(*)	List prices with discounts	Cash discounts FOB points Guarantees Engineering data
Slide fastener	List prices with discounts	Complete schedules of terms, discounts, & conditions of sale
Sheet Metal Distributors	Base prices with extras	None
Talc and soapstone	Base prices with extras	Terms of payment
Transparent Materials converters	List prices with discounts	Differentials Discounts Trade allowances Special charges
Card clothing	List prices with discounts	Cash discounts Freight allowances
Wholesale monumental marble	List prices with discounts	Cash discounts
Road machinery mfg.	List prices with discounts	All terms & discounts to consumers
Industry D (*)	List prices with discounts	Terms of payment - short and long
Power & gang lawn mower	List prices with discounts	Trade discounts Terms of sale
Cutlery, manicure, implements, & Painters and paperhangers tools	List prices with discounts or Minimum net prices	Cash discounts Freight allowances Terms
Household ice refrigerator	List prices with discounts	None

(*) Requested that reports be confidential

Industry	Form of Prices Filed	Information Filed
Asphalt & mastic tile	Base Prices with extras List prices with discounts	Discounts Freight equalization Terms
Concrete mixer	List prices with discounts	None
Air filter	List prices with discounts	Cash discounts

This experience in industries outside of the sample tends to confirm the impression which emerges from an examination of the evidence in the industries studied that the supplementary information filed in addition to nominal prices was quite limited in scope. This indicates that where the requirements regarding information ran in terms of "all other terms and conditions of sale", members chose to construe this phrase very narrowly and failed to report more than a small part of the variables which made up their pricing policy.

Note should be made at this point of certain types of filings in which the information actually filed was rendered practically meaningless by the nature of the information. In some industries, notably in valve and fittings, many members adopted the practice of making conditional or qualified filings, in which they included that they would sell certain accounts below filed prices if necessary, or that they would sell any buyer below filed prices under certain circumstances.(*) The National Fertilizer Association was also forced to issue a rule forbidding such a practice. (**) Likewise, in some industries members persisted in filing what they described as minimum prices whereas both the code and the code authority instructions called for actual prices. In other cases where only the filing of minimum prices was required, some members proceeded to file extremely high discounts or extremely low prices. These were intended to be nominal, those filing them never expecting to sell as low as the prices indicated. Through the ability to sell above filed prices, the member thus might sell at whatever prices or terms he chose and accordingly he was able to defeat the whole function of price filing. Such practices appeared in the ladder industry, in certain divisions of the electrical manufacturing industry and in the canvas goods industries,among others; in the latter industry minimum prices as low as 99% off list were filed.

5. Obstacles In the Way of Including Full Price Information.

It is evident that any plan for publicity which places sole emphasis upon price information, will face serious difficulties with respect to the scope of information included. The very nature of such a kind of price publicity makes it essential to include substantially all of the factors which affect the final net cost to the buyer; otherwise the significance of the partial information that is assembled is greatly lessened by unreported price concessions, which by altering the net cost to the buyer, will determine his ultimate decision as to whose product he will buy.

(*) Minutes of Code Authority Meetings, Sept. 5, 1934, and Oct. 16, 1934, In NRA files, valves and fittings industry, No. 21.

(**) National Fertilizer Association, Regulations covering the filing Open Price Schedules, Section 4, July 11, 1934, NRA files.

Opposed to this basic requisite are the difficulties involved in securing complete coverage, and the factors which lead to non-performance by members. In the first place, aside from the question of general willingness to participate in a price filing plan at all, many producers and particularly the smaller ones begrudge the time, effort, and expense involved in preparing a very detailed filing schedule and in reporting each minute change in such a schedule. Protests from industry members were frequent upon this score. The burden upon members may be tremendous when separate filings are required for different products, for different classes of customers, for different areas, etc. Ultimately, the possibilities of any system are rigidly limited by what the participants will willingly do.

Another difficulty encountered which varied in degree as between larger and smaller members was the failure of members to have a clearly formulated and consistent policy with respect to each of the variable price factors. Accordingly, they found it difficult to set them down in the explicit fashion which the system contemplated. The smaller members, for example, might lack a consistent policy with respect to the acceptance of returned goods, special services rendered, or transportation terms. Thus they would find it impossible to formulate the exact nature of their policy. Closely allied to this difficulty was the intangible nature of many of the supplementary factors which defied the efforts of any member, large or small, to make explicit their pricing policy. Such matters as special services rendered, training customers' employees, practices with respect to unpaid accounts, etc., cannot be covered with a few words. Since, under the publicity function, this information is filed so as to apprize competitors of such policies, it is valueless unless it is in such shape that competitors can comprehend the matters concerned.

It is evident from the experience under NRA that complete information cannot be obtained by the central agency, simply through a blanket request for the filing of "all terms and conditions". Instead, it was found necessary to request specifically item by item the types of information wanted. This precipitated a race between the code authority and certain members --the former attempting to discover all possible ways in which indirect price concessions could be made and to include them specifically in the filing plan; the latter to discover new ways to shade net prices to customers which the code authority had not yet discovered nor brought under the searchlight of publicity. The macaroni industry faced the problems of premiums, open-end contracts, and the diversion of brokerage to trade buyers--all devices to make concessions from the prices publicized by the price filing system. In the floor and wall clay tile industry and certain divisions of rubber manufacturing, first grade products were sold at a reduced price by calling them "seconds". In the valve and fitting industry, sellers supplied free "missionary salesmen" to buyers. In the gas appliance industry free deliveries, and crating and carton allowances were methods used to attract customers. There are, as a matter of fact, almost an illimitable number of ways in which such indirect concessions may be made; and this fact almost predestines the code authority to be the loser in its race with industry members determined not to reveal all of their pricing elements to competitors.(*)

(*) Other examples of evasive practices are given in Chapter IV, [illegible], pp. 230-272.

Granting that members are able and willing to supply full information, there remain in any case the difficulties resulting from the great complexity of detailed pricing information. This complexity would be a mechanical factor in the assembling of information, in its compilation by the central agency, and in dissemination. The complexity would also tend to impair its usefulness to members, for the greater the number of items, the greater presumably the difficulties of comparison. These considerations are always present when attempts are made to include more than certain basic items within the price filing plan.

There apparently was never any marked conflict between industry desires and NRA policy regarding the scope of price information which was included in price filing. From the start NRA approved codes which required the filing of all terms and conditions and in its authoritative statement of policy in Office Memorandum No. 228, issued June 7, 1934, it was provided that filing should embrace prices, discounts, rebates, allowances, and all other terms and conditions of sale. This was reaffirmed in the administrative policy announcement of April 23, 1935, "New Series No. 1", in which it was stated that in industries where all the factors helping to give identity to price could not be reported, "it is questionable whether an open price system can be effectively used". Industries proposed, however, on numerous occasions that some of the difficulties cited above be eliminated by prohibiting entirely or by limiting the amount of certain indirect concessions. In some cases code authorities actually set up rulings prohibiting certain types of concessions in an effort to remove them as competitive factors. NRA especially during the latter part of the code making period, refused to sanction the rigidification of otherwise variable elements in the price structure and insisted that they be reported through the mechanism of price filing rather than being outlawed or severely limited. (*) Office Memorandum No. 228 required that information filed "shall completely and accurately conform to and represent the individual pricing policies of said member". Thus, there was a definite conflict of views here with NRA stressing publicity as opposed to regulation.

D. Products Included Within Price Filing

(*) This policy was specifically stated with reference to free deals, prizes, and premiums in NRA Policy Memorandum No. 316 on December 6, 1934, and with reference to advertising allowances on No. 326 on January 5, 1935, NRA files.

1. Issues and Controversies

The range of products upon which price filing was established was another important factor which conditioned the degree of publicity ultimately realized. It was found that some types of products were not adapted to price filing, for one reason or another, and accordingly their prices were excluded--either by the code, by the administering agency, or in practice by the members themselves. The central problem in this connection relates to the kinds of products which lend themselves to price publicity through price filing.

The question of whether price filing can be applied to all the products of an industry is the other side of the question as to what products should be excluded from the filing requirements. One issue then was whether filing should apply to all products or whether it should be confined only to "standard" products with the omission of non-standard products. Where products were made to order on customer specification or custom built, it was argued that price filing could not be used because of the impossibility of setting up bases of comparison. Likewise, where individual producers made products of unusual nature, size or type, it was sometimes felt that price publicity would perform no useful function. But opposed to these views were those which insisted upon including all products of the industry within the scope of price filing because of the possibility that products not included would be used as a means of price-cutting in joint orders. Also in those industries where there was a very great number of products, the question of whether or not it was feasible to include all products arose. This was resolved in a few cases as in paper distributing by limiting price filing to the most competitive products.

Disagreement occasionally arose as to how far an industry should go in attempting to include sub-standard products. It was felt by some that the filing of all the different cut-rate prices at which seconds, used goods, obsolete goods, etc., were sold would unduly complicate filing without contributing a great deal to price publicity. On the other hand, it was pointed out that the sale of these goods was oftentimes in competition with the sale of first quality goods and that the prices of the former exert an influence over the general price structure. A similar problem existed in the case of goods which were sold in so-called non-competitive channels, such as for export or for consumption, further fabrication or distribution by an integrated concern.

A further problem arose from the competition of similar or substitute products produced by other industries. In some cases it was felt that if price publicity could not be secured for all products which competed directly or indirectly with industry products, it would do more harm than good by making filed prices a target for price cutting.

The major difficulty faced, in determining upon what products filing should be used, resulted from the diversity of products made by different members and the difficulty of securing adequate bases of comparison. This necessitated, in the first place, the supplying by filing members of full descriptive data in order that comparisons could be made. In some industries

elaborate and detailed information would be necessary in order to accomplish this. The other need created was for a comprehensive system of product classification or of product standardization. Where such was not possible of achievement diversity of products with respect to physical form or quality easily could render worthless efforts at price filing.

2. Code Requirements.

About one-third of the price filing plans, or one hundred and forty-four, provided that prices be filed on all products of the industry. In forty-five the requirement was confined to the "standard" products, whereas sixty-six included standard products and such "non-standard" products as the code authority should designate. In a part of these, "standard" was defined as products which were ordinarily sold upon the basis of printed price lists. A few codes specifically named the kinds of products to be included while a small number of others named the products to be excluded and required that all other industry products be included. The responsibility for designating the products for which prices were to be filed was placed in the hands of the code authority in ninety-six codes, while in forty-five others this responsibility was left with industry members on the basis of majority vote.

The codes for the industries in the sample commonly required either that prices be filed for "all products of the industry", or that a member file "his prices" without specifying for what products. A few of the codes incorporated NRA Policy Memorandum No. 228 which limited the policy to "standard" products and such non-standard products as should be designated by the code authority. Only the Canvas Goods Code enumerated certain specific products for which prices should be filed. Thus, in all instances the ultimate responsibility of determining what products should be brought under price filing was shifted from the period of code writing to subsequent code authority and industry decision. The requirement that all prices or prices for all products sold be filed was specific in a sense but failed to provide for those cases where filing was not found to be feasible.

3. Code Authority Expansion or Modification of Code Requirements

In some of the industries it was attempted to cover all products in the price filing plan originally set up. In the asphalt shingle and roofing industry, in accordance with the code, filings were required on all products; no major obstacles were encountered relative to this point, due perhaps to the fact that products had been quite standardized for some years under the influence of patent controls and other factors. (*) The scope of the candy manufacturing plan was all inclusive, the products having been classified by Dun and Bradstreet into eighteen classes with a miscellaneous class for all otherwise unclassifiable items. (**) Prices

(*) See Appendix A, Price Filing in Asphalt Shingle and Roofing Industry.
(**) Code Administration Bulletin, No. 1, Code Authority for Candy Manufacturing Industry, NRA Files.

in the carbon dioxide industry were filed under two divisional groups, liquid and solid. (*) As late as a year after the code went into effect, the executive committee of the copper and brass mill products industry required its members to file prices on all products which they sold; presumably, exceptions had not proved necessary during the first year of operation. (**) The Fertilizer Code required the filing of prices "for all grades or kinds of mixed fertilizer, superphosphate, and for other fertilizer material sold or offered for sale". In pursuance of this, it was required that prices be filed for all products sold, regardless of whether or not a special type or formula; this policy was supported by NRA rulings to that effect. (***) Members of the fire extinguishing appliance manufacturing industry were instructed that:

> "The filing of prices should include generators, generator power, extinguisher brackets, repair parts, recharging date tags, etc., -- it being the sense of the meeting that everyone was expected to file a price on every item which he manufactures (or has made for him to his own specifications or formula) which comes within the definition of the Code." (****)

In the steel casting industry members were required to file prices for all types of casting; this was made possible by the product classification set up in that industry just prior to the code and assiduously refined during the period of code operation. (*****) Similar instructions by code authorities as to products included were issued in the gas appliances, ladder, marking devices, mayonnaise industries and in certain regions of the retail monument industry.

The field of administrative discretion entrusted by the code was, of course, considerably broader when it provided for the filing of prices on "standard" products only or expressly empowered the code authority to prescribe the products. The Business Furniture Code Authority tried to include custom-built "specials" within the scope of "current standard lines" but this was held unauthorized in an NRA interpretation. (******) It was decided by the electrical manufacturing industry that prices need not be filed for "tailor-made" products. (*******) The machine tool and forging

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(*) Prescribed reporting form in NRA files.

(**) Bulletin Issued November 7, 193-, NRA files.

(***) Letter from deputy administrator to Fertilizer Recovery Committee, April 1934; (In NRA files, fertilizer industry.)

(****) Letter dated October 17, 193 from A. O. Boniface, Secretary of Code Authority to Member of the Industry, (Bulletin No. 80); (In NRA files)

(*****) Commercial Resolution No. 7 of Steel Casting Code Authority, NRA files

(******) Administrative Order No. 88-27, November 30, 1934, NRA files

(*******) Minutes of Executive Committee of N.E.M.A., Nov. 23, 1934, NRA Files

industry had considerable difficulty in formulating a workable definition of the phrase "standard product, accessories, and/or attachments" as used in the price filing provision of the code. Eventually the following definition was arrived at:

1. "A standard product is any machine, or any accessory or attachment to which a manufacturer applies a designated number, or size, or name, that might or should indicate to an informed person a specific type of machine, accessory or attachment; or

2. Any machine, accessory, or attachment which is offered to a customer a competitive style, type or design to established product on which product a price has been filed with the Supervisory Agency by any member of the industry. . . . .

3. The addition to, or elimination from any machine of any special feature shall not, ipso facto, be considered as excluding any machine from its classification as a standard product." (*)

The Marketing Devices Code Authority seems to have left the final determination to the discretion of each member, for it required members to file prices only for products "customarily" offered for sale; for other items they were simply required to file their "pricing formula".(**) In the heel and sole division of the rubber manufacturing industry, for which the code prescribed filing only for standard products, a controversy arose concerning quality standards which was partially responsible for the final abandonment of price filing in the code. The Hagerstown Rubber Company maintained that its products were inferior in grade to those of the so-called "Big 3" and refused to file prices, contending that they would be met by the larger companies, who thus would effectively destroy its market. The Valve and Fitting Code required the filing of prices for "product normally available to the trade." Consequently, the Code Authority exempted from filings products of special design but required that the prices quoted for such special products be not less than prices on file for "similar" products normally available to the trade. (***) The main problem which was confronting the code authorities in each of these industries was to exclude, in some way, special items from price filing without making the definition so broad that certain genuinely competitive items would be excluded also.

More significant, perhaps, are the specific products which were exempted from price filing and the reasons therefor. The Cast Iron Soil

(*) Supervisory Agency Bulletin No. 25 to Members of the Industry, October 10, 1934; (In NRA files, machine and tool forging industry.
(**) Letter, from the Code Authority to Members of Industry, dated December 7, 193[illegible], (In NRA files for marketing devices industry.)
(***) Letter, dated April 20, 1934, from the Code Authority to Members of Industry. (In NRA files, valve and fittings industry.) This interpretation was later objected to by the Administration.

Pipe Code required the filing of prices on pipe and fittings and service valves, and roadway or meter boxes. The code authority called for prices only for pipe and fittings and failed to require them for the other items. Complaint was made by members producing only the latter items that various manufacturers of all industry products were supplying the latter items as free goods, and that that fact explained why filings were never required on them. The NRA pointed out these facts to the Code Authority and asked for an explanation. (*) The following exemptions from price filing were made at one time or another in the crushed stone, sand, gravel and slag industry; chemical, metallurgical and similar products; products made from State owned or controlled materials; products sold by a railroad from its own quarry; and ground limestone produced as a by-product. In the farm equipment industry materials and parts were not included in price filing when used for further manufacture, for assembly replacements or for repair. (**) The removal of tennis footwear from the price filing plan of the rubber footwear division of rubber manufacturing was explained by the fact that three members of the industry refused to participate in price filing. (***) The Code Authority of the shovel, dragline and crane industry exempted some of the very largest products of the industry from price filing while including all others, namely, machines of three cubic yards of capacity or more, three motor electric machines, steam machines and locomotive types. (****) After about six months of inclusion in the price filing plans, septic tanks were withdrawn by the Code Authority of the Vitrified Clay Sewer Pipe Industry in Resolution No. 56 dated May 24, 1934; no reason therefor was assigned. Price filing for school jewelry in the Medium and Low Price Jewelry Code was never put into effect at all. Finally, a shift in fashion may be credited for the eventual inclusion of mono-tone covers in the price filing plan of the nottingham lace curtain industry after it had once been excluded in favor of two-tone covers.

In a number of cases code authorities brought various types of sub-standard products within the price filing plan. The motivating factor in these cases was the fact that these products threatened to enter into direct competition with first quality products; complete publicity regarding all price factors in the market was thought to necessitate their inclusion. Thus members of the steel office furniture division of the business furniture industry were required by the code authority to file proposed price lists with quantities of all de-standardized

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(*) Letter dated March 13, 1935, from the deputy administrator to the Code Authority, (in NRA Files, cast iron soil pipe industry. No record of the reply of the Code Authority can be found in the files.)

(**) Code News Bulletin, September 4, 1934, issued by Farm Equipment Institute to Members of Industry, NRA files.

(***) Letter, dated August 20, 1934, from Chairman of the Code Authority A.L. Viles, to members of the Code Authority. (In NRA files, rubber manufacturing industry).

(****) Letter, dated November 13, 1934, from the Code Authority to Members of the Industry, (in NRA files, shovel, dragline and crane industry).

and obsolete merchandise. (*) In the electrical manufacturing industry it was required that prices on obsolete stock should be filed but not distributed. The executive committee of the farm equipment industry required the filing of prices for obsolete, shopworn, and "bargain" goods where their quantity or manner of disposal were capable of demoralizing the market for new goods. (**) The eastern regional committee of the vitrified clay sewer pipe industry on October 9, 1934 received filings from a member covering 25 carloads of culls; they decided not to accept this for fear that it would affect market conditions unfavorably. On November 13, they again refused to accept the filing of a price for culls, stating that the use of such pipe for sanitary sewers was not recommended due to the doubtful quality of cull pipe. (***)

Another difficulty related to the types of products included is one that will inevitably face any program for mandatory price publicity. It resulted from the fact that certain products of a given industry were also produced in part by sellers whose major production fell in another industry and who, therefore, were under the jurisdiction of that industry. The same situation existed when closely substitute products were produced in other industries. Unless publicity of prices applies to all producers of the product or closely substitute products within or without the industry, full publicity cannot be realized. A few examples taken from experiences under NRA will suffice to illustrate the point. The cordage and twine industry was forced to exempt the International Harvester Company from filing its prices on binder twine, because it was not successful in inducing prison operated plants to file prices. The farm equipment industry had difficulty with the lumber manufacturers who made farm equipment and who did not wish to file. There was a considerable amount of direct competition between products of the floor and wall clay tile industry and those of structural clay products and terra cotta industry. The industrial alcohol industry insisted on delaying the operation of its price filing on one form of anti-freeze until price filing for the same product was set up in the hardwood distillation industry and provisions were made for an exchange of price lists between the two industries. The metal window industry had similar difficulties in its relations to the all-metal insect screen industry. Other industries in the code sample which faced similar difficulties were the paper distributing industry, which could not secure price filing by wholesale grocers; scientific apparatus in relation to members of the chemical industry; and wholesale confectionery

(*) Bulletin issued by Code Authority to Members of Industry, August 7, 1934; (In NRA files, business furniture industry.)

(**) Minutes, January 24, and March 16, 1934; (In NRA files, farm equipment industry).

(***) Minutes of Eastern Regional Code Authority, January 17, 1935; (In NRA files, vitrified clay sewer pipe industry).

confectionary in relation to allied line wholesalers. These difficulties were of classification, jurisdiction and definition of product, and necessarily must have been settled upon factors peculiar to each case. Regardless of the fact that no general rule can be made applicable, they constitute one of the greatest difficulties faced in establishing a successful system of mandatory price publicity.

Products which went into non-competitive channels or which from their nature were non-competitive were frequently exempted from price filing requirements. Sales of carbon dioxide in small containers to the medical field were exempted from filing by the Carbon Dioxide Code Authority. (*) The Cordage and Twine Code Authority exempted yarns, twines, and other products when used for the manufacture of carpets, rugs, and furniture. (**)

Note should be taken at this point of a matter closely related to the types of information that should be filed. Many code authorities required the filing of descriptions of products along with prices and sometimes set forth detailed rules covering the point. The Asphalt Shingle and Roofing Code Authority required the following data descriptive of products included: average weight per square for unit of sale, number of square feet supplied at unit sale price, dimensions of shingles, number of shingles per square, and number of bundles per square. (***) Likewise, in the funeral supply industry full descriptions of products were required with the proviso that samples or illustrations must be forwarded if the nature of the product made descriptions impractical. A similar requirement was made by the Marking Devices Code Authority. In the retail monument industry, it was provided that where a full description of each type of monument was impossible, members should file unit prices for the constituent processes of supplying material, cutting, polishing, lettering, etc.

One of the major difficulties in selecting products upon which filings should be made was the diversity of products as between different members and the resulting lack of comparability of information filed. Unless some common basis of comparison between products is possible, price publicity is without meaning. The lack of similarity between industry products in some industries discouraged efforts at price publicity from the start and no provision was placed in the codes of these industries. Other industries tried price filing but lack of standardization forced its abandonment or at least caused grave difficulties. The remaining industries either were fortunate enough to have a customary or well-established formal plan of standardization before their codes were set up, or they succeeded in devising a workable plan during the code period. There is summarized below the experience of the industries examined with respect to this problem. It should be emphasized that "standardization" here refers primarily to definitions and classifications for the purpose of filing and only incidentally to standards of quality.

(*) Minutes, August 13, 1934, NRA files
(**) Minutes, May 15,18, 1934, NRA files
(***) Explanation issued by code authority, April 4, 1934, NRA files

In the asphalt shingle and roofing industry, a system of product classification and definition was quite well established before the code was approved, due partly to the fact that a considerable proportion of the industry were working under the same basic patents. The baking industry in its uniform reporting form broke down its products into the following classes:

1. Bread
   (a) White; (b) Pullman; (c) vienna; (d) French (e) raisin; (f) whole wheat; (g) rye; (h) special and other.
2. Rolls
3. Sweet dough goods
4. Cakes
   (a) pound; (b) loaf; (c) layer; (d) cup.
5. Cookies
6. Doughnuts
7. Cream goods
   (a) puffs; (b) eclairs
8. Other products

All products were to be classified under one of these groups or subgroups and a price was filed for the class only; however, provision was made for indicating the weight of the item classified, the unit price, the price per pound. A set of symbols were used to indicate whether the product was in wrapped wax paper, in wrapped cellulose, sliced, or packaged. Thus, a workable classification of products by type was obtained, but there was still lacking a classification by quality based on ingredients used.

The candy manufacturing industry delegated the job of classification to Dun and Bradstreet, which eventually established the following eighteen classes of products:

Five and ten-cent Units (Including bar goods and cellophane packages)
counter goods
penny goods
package goods
butter cream goods
caramels (wrapped)
chocolate (bulk)
cocoanut work
cream work
gums and jellies
hard candy-solid, filled, mixtures
marshmallows
lozenges
pan work
iced goods
licorice
chocolate moulded goods
miscellaneous

Thus, instead of attempting to have each member file prices for each of his different products, it was requested that he classify his products under the above groups and file one price for each group for which

he sold products. (*)

A product classification set up by the steel castings industry in conjunction with a cost study facilitated the smooth operation of price filing in that industry. Although there are some 120,000 possible patterns which are sold, these were grouped into only 1,200 classes and prices were filed only for these classes. Thus, the average number of actual products represented by each class was one hundred. In the fertiliser industry an established list of grades was approved, but difficulties resulted from the mixing of grades and the labelling of such mixtures as "special formulae"; open formula fertiliser could be sold only if the schedule filed set forth price clearly enough so that any competitor could compute exactly what the filer's price would be for any combination. Detailed rules were issued by the Macaroni Code Authority setting up quality standards and labeling, and these were utilized in the classification of products for filing purposes, with such grades as "semolina", "farina", "flour", and "substandard". A gross price list was developed in the metal window industry over a period of years, from which members quoted their discounts; a thorough system of product classification was thereby achieved. However, filing on non-ferrous windows was abandoned as impractical because some manufacturers in that branch refused to participate in efforts to set up product standardization. (**) A "Book of Standards" seems to have been in wide use in the vitrified clay sewer pipe industry, which undoubtedly provided some measure of standardization of products.

In a number of other industries, however, price filing was hampered by the lack of product classifications or standardization. Thus, in the cast iron soil pipe industry, the service valves and roadway or meter boxes produced by different members were quite dissimilar, and difficulties of setting up a plan of standardization which could be correlated with the system of base prices and uniform differentials in effect made filing on these products very difficult, though specifically required by the code. The lack of uniformity in products made price filing completely impractical in numerous product divisions of the electrical manufacturing industry. A considerable proportion of the folding paper box industry was made-to-order to specifications of each individual customer; standardization was practically impossible for these, a fact which led the industry to propose a system of filing costs instead of prices. This was also true of the set up paper box industry. Certain regional committees of the paper distributing trade endeavoured to classify products as filings came in, but their lack of success caused considerable difficulty in the operation of price filing. It has been pointed out above in another connection that price filing in the heel and sole division of rubber manufacturing was rendered virtually unworkable by the absence of quality standards. The Code Authority of the Shovel, Dragline and Crane Industry attempted to achieve a degree of product classification through listing certain product groups on the uniform reporting form devised; this met with opposition

(*) Code Administration Bulletin No. 1; (In NRA files, candy manufacturing industry).

(**) Resolution of Code Authority, January 23, 1934 (In "Rule Book", page 1), NRA files

from various members on the ground that it was unauthorized by the code, a fact which impaired its effectiveness. Price filing in various regions of the structural clay products industry was greatly hampered by lack of classifications of brick for filing purposes. Other industries in which lack of product standardization made a smoothly working price filing system impractical included retail monument, scientific apparatus, and canvas goods.

One of the greatest difficulties arising from lack of specific grading on product classification in some industries was the possibility of evasion by the seller in supplying a product of a higher grade at the price filed for a lower grade. The various divisions of the paper and pulp industry devised very elaborate grading systems for industry products and attempted to secure approval for mandatory differentials for size, weight, color and other variations in specification. These differentials were disapproved by NRA but were in large measure made effective by price filing forms and code authority regulations. Even so, the possibilities of evasion remained. This difficulty was enhanced by the provision that members could justify filed prices as "meeting the competition" of some other company. It was not feasible to determine when such filings actually met competition unless comparability of grade could be ascertained. The code authority in a proposed revised code sought to include the requirement that "samples" be submitted with each filing.

It is clear from the evidence presented that the agencies administering price filing installed it with most success and frequency for industry products that were directly competitive and where the nature of products made comparability and classification feasible. In industries where the number of products is great and natural groupings do not exist, it seems doubtful whether a meaningful degree of price publicity can be secured through a price filing system unless a system of product classification and standardization is put into effect.(*)

4. Performance by Members.

As might be expected, the degree of compliance by members with codal and administrative requirements regarding products included was greater than in the case of requirements regarding information, that is, aside from refusal to file any prices. There is little evidence that members arbitrarily refused to file prices for certain types of products, while at the same time filing them for other types. This is probably due to the fact that code authorities generally did not institute price filing in the first place where difficulties of description, comparison or classification were insurmountable. In those industries in which the Code Authority required filings on all products, there is no available evidence to indicate that members regularly and deliberately omitted certain items. However, in some cases the filings upon standard products only were satisfactory, while those on non-standard products were not in a form which would convey the price for this type of product. This situation existed in the machine tool and forging, shovel, dragline and crane, and agricultural insecticide and fungicide industries.

(*) The possible rigidities resulting from such methods and their use in conjunction with fixed price differentials is discussed in Chapter IV, pages 231-242.

Beyond this evidence, only a comparison of all products upon which members actually filed as revealed by their actual filings with a comprehensive list of industry products would reveal products excluded from filing.

The obscurity of meaning in individual filings and the lack of comparability in the filings made by different members caused far more difficulty. In some industries no descriptions of products were requested or supplied and, as a result, the publicity of prices realized was of little value, since members found it difficult to compare their own price with others. In other cases, descriptions were requested and filed, but frequently proved to be too brief to be of great help. Where no product classifications or plan of standarization were established, the filings that were made - although frequently made in ful accordance with requirements and fully disseminated - often failed to convey to members the prices at which their competitors were selling competing products. This deficiency was ofiset in some cases where the attaching of the maker's name or brand to his filed prices was sufficient identification for his fellow competitors in the industry or perhaps even for customers. But where there were a large number of industry products or a large number of producers this factor did not exist. Other industries in addition to those cited in which filings made were unintelligible because of the absence of product classifications were structural clay products, scientific apparatus, and retail monument.

In conclusion, it seems evident that, in determining upon what products price filing may be feasible, there must be a certain amount of uniformity or standardization of products, or a practical scheme of classification must be devised and full characteristics of the product be included along with the price information filed.

E. Transactions Included Within Price Filing.

1. Issues and Controversies.

Unless prices are filed for all classes of buyers, full publicity cannot be achieved. And if prices to certain classes of buyers are not publicized, the effects of such exemptions may be to render the partial publicity realized for other transactions meaningless. Consequently, the requirements and performance with respect to this matter are of vital import in evaluating the degree of publicity obtained. The general theory of publicity, as pointed out above, raised a presumption in favor of including all buyers. But opposed to this were arguments for the exclusion of prices to three types of buyers. Unlike some of the other controversial points, these issues generally crystallized before performance by members became a reality. This was because they involved definite conflicts of interest rather than more purely difficulties of operation.

The first type of buyer whose prices it was frequently desired to exclude was the very large buyer who was receiving an extremely high discount. The arguments advanced in favor of such exclusions were that they would lead to agitation by smaller buyers, not really entitled to the lower price, to receive the same prices as given to the larger buyer. It was argued also that an agreement with the buyer, that the price be kept confidential bound the member. Thus a member of the plumbing fixtures industry, in explaining his failure to file his contracts with mail order houses, stated that:

> "Our contract with the mail order customer predates the effective date of the code and we must comply with contracts pre-existing the code. Our arrangements with this mail order customer go back as far as 1904; the selling price under this contract is based on all costs plus a fair profit; also ties in with a contract and Trust Indenture for a one million dollar bond issue due August 1, 1939, or as long as any of these bonds are outstanding" (*)

Likewise, the Universal Sanitary Manufacturing Company stated, in connection with the same issue; that:

> "This company has gone on record as to its entire willingness to file with the Administration member of the code authority or with the NRA certain contracts of a highly confidential nature, entered into in writing prior to the effective date of the code. This company does maintain that the filing of such contracts, thereby making them available to the inspection of competitors

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(*) Letter dated May 1, 1934, from Rundle Manufacturing Company to Assistant Deputy Jacoby, filed along with brief from five manufacturers. (In files, plumbing fixtures industry, Volume I-a)

might work a hardship upon the company and interfere in an unwarranted manner with the merchandising and sales program of the company as to matters wholly beyond the purpose of the code."(*)

Opposed to the exemption of such buyers was the argument that such an omission would destroy the value of publicity of other transactions; and that it would defeat one of the major functions of price filing, namely, the elimination of discrimination.

The second type of transaction which it was often desired to exclude were transactions between industry members and with buyers owned or controlled by members. The motive here was to preserve the competitive advantage of the integrated concern.

The third type were transactions with buyers where these buyers also purchased goods from intermediate distributors who sold in direct competition with members and did not file their prices. It was argued that members who sold directly to these buyers would be at a competitive disadvantage if their competitors, the intermediate distributors, were not required to file.

Another issue provocative of considerable discussion centered around the problem of giving meaning to the classes of customers for which prices were filed. Excepting in those industries where the classes were firmly fixed and defined by customary usage, the uncertainty as to what buyers or types of buyers were included within the classes for which each member filed prices lessened the comparability of prices from the standpoint of publicity and permitted wilful evasion of filed prices. Not only was there lack of knowledge regarding the types of buyers included within each class, but different members classified their customers differently in filing prices. For example, one member might file prices for distributors, jobbers, wholesalers, and retailers; another member might file for wholesale distributors, brokers, mail order houses, chain stores, and dealers. From the names of the classes it was not clear what customers were included in some of those classes, and accordingly prices filed by two members could not be compared. When, as was a common practice, members filed different prices for different sub-groups of a given class--such as "large", "meduim", and "small" wholesalers or "special" and other jobbers, the boundary line between one group and another could not be determined from the filings. Even where prices were filed for identical classes, there remained the difficulty of where any given buyer was included. Was Chain Store X a mass distributor or a retailer? Was Mail Order House Y a wholesaler or retailer? Was Company Z given the distributor, jobber, or wholesaler price?

An appreciation of this difficulty led to proposals to make custom classifications comparable. Various methods were proposed and some found their way into the codes. A simple listing of classes for which members were required to file prices was proposed in some instances. In others it was argued that there should be included with such a list mandatory or suggestive definitions of each class which incorporated the qualifications necessary for the inclusion of a buyer in any given class; these definitions were sometimes written into the code and sometimes promulgated by the code authority. The most extreme measure was

(*) Letter to Assistant Deputy Jacoby, May 1, 1934, NRA files.

the proposal that the code authority be empowered to classify all of the individual buyers of the industry into such classes as it deemed proper. The other general method of securing comparability which was proposed was for members to file the definitions of the classes of customers for which they filed, or to file the names of their customers to whom each of the various prices or discounts were to be given.

Some of these methods were opposed by representatives of buyers and by the NRA. The NRA, while sympathetic with the efforts to advance comparability of prices, foresaw the possibilities of control over prices and channels of distribution, and was accordingly reluctant to approve most of the proposals. (*) From the viewpoint of publicity, the problem is analagous to problems raised in connection with information and products included in that comparability of information filed is without doubt advanced by requiring uniformity of certain terms of sale, by classifying products, or by securing uniformity of customer classifications; but the advantages for price publicity must be balanced against the price control which such measure may implement.

2. Code Requirements

The codes, as a rule, were fairly explicit upon the matter of transactions governed by the price filing provisions. Generally they included all types of buyers and transactions within the scope of the price filing plan. Out of the 444 codes, only fifteen enumerated certain specific classes of buyers for whom it was required to file prices. The question of whether or not these enumerations omitted certain classes is a factual question which depended upon the total number of classes in each of these industries and accordingly, is not capable of definitive answer. However, there is positive evidence that in some of these fifteen industries, the prices to certain large buyers were exempted from the filing requirement. Five codes specifically excluded prices to governments and a few other codes made other specific exclusions. Aside from this group of codes, the code filing requirements embraced prices to all types of buyers.

3. Code Authority Expansion or Modification of Code Requirements.

Generally in the industries studied, the instructions of the code authority simply restated the terms of the code with respect to transactions to be included. Instructions contained in bulletins and letters to members issued by the code authorities for the following industries required the filing of prices for "all buyers" without particular qualification; asphalt shingle and roofing, builders supplies, cordage and twine, electrical manufacturing, floor and wall clay tile, macaroni, machine tool and forging, marking devices, baking, funeral supply and valves and fittings.

(*) The problem of customer classification is discussed in Chapter IV pp. 242-256 . with especial reference to its control aspects.

The code authorities of a number of other industries issued rules enumerating classes of buyers for which prices shall be filed. The degree of compulsion upon members to observe these groupings or uniformly to classify specific customers into certain classes varied: some were intended to be only suggestive while others provided complete code authority supervision over the classification of specific buyers.(*)

Thus the agricultural insecticide industry required the filing of prices to consumers, dealers, and jobbers, and also of commissions paid to brokers. A resolution of the Asbestos Code Authority required prices to consumers, dealers, and jobbers. Code Administration Bulletin No. 2 of the Candy Manufacturing Code Authority required prices for wholesalers, wagon jobbers, retailers, large, medium and small chain stores, large, medium and small syndicate stores, cooperative buyers, concessionaire, and vending machine operators. In the canvas goods industry the filing of prices only to retailers and wholesalers was required. The uniform reporting form of the carbon dioxide industry contained blanks for consumer, chain store, and retail prices. The envelope industry in Bulletin 17 c required the filing of prices to wholesale distributors, wholesale-retail distributors, commercial printers and other retail distributors and consumers. The Farm Equipment Code required filing of prices to jobbers and dealers, but the code authority informed a member that he must file his prices to mail order houses.(**) In the Fertilizer Industry, prices were required for consumers, dealers, and agents.

Ruling No. 2 (Revised) of the fire extinguishing appliance industry specified distributors, jobbers, very large users, dealers and general consumers, with elaborate definitions for each. Rule No. 7 of the Gas Appliances Institute required prices for export sales, large purchasers, wholesalers, jobbers, brokers, retailers and consumers. The gas water heater branch of this industry varied the list somewhat, as follows: exports, utilities, jobbers, mail order houses, direct-to-you, plumbers, and consumers. It was also specifically required in this industry that prices for private brand or special label sales be filed. The Mayonnaise Code Authority required prices to wholesalers and retailers only but made mandatory the classification of certain large mass distributors as retailers.

There is not much evidence that code authorities granted formal and positive exemptions of prices to certain types of buyers, although, as pointed out above, this may have been done indirectly by omitting certain types from the lists issued. Specific rulings exempting prices

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(*) See Chapter IV, pp 242 - 256 for full discussion of problem of customer classification.

(**) Letter from the Farm Equipment Institute to David Bradley Manufacturing Works, dated February 1, 1934 (In NRA files, Farm equipment industry.

charged fellow manufacturers in the industry were made in the agricultural insecticide and fungicide, carbon dioxide, floor and wall clay tile and valve and fittings industries. In the plumbing fixtures industry, where such sales were quite important, the code authority attempted to set up a plan by which prices to fellow members were filed separately. Prices for products going into export channels were specifically exempted in some cases, notably in the farm equipment, the mechanical rubber goods division of rubber manufacturing and the copper and brass mill products industries. Specific exemption was made in some cases for prices at which affiliates or branches were billed. In the fertilizer industry, filings on sales to wholesale cooperatives were not required of members but these cooperatives in turn were required to file their prices. Efforts were made in the fractional horse-power motor division of electrical manufacturing to secure the exemption of prices of sales involving $100,000 or more but this was denied by NRA.

The evidence examined in the industries included in this study indicates that filing of prices was generally required for all types of buyers and transactions, with only a few isolated exceptions. Genuine price publicity could hardly be secured otherwise, for where there was agitation for exemption, it was concerned generally with prices to buyers of the greatest volume.

4. Performance by Members

Code requirements for customer classification in most cases were either vague or general. Code authority rulings tended by enumeration and definition to make them specific. In industries where the code or code authority definitely prescribed and possibly defined the varuiys ckasses if buyers, filings were made on this basis. In industries where no list of customers was set forth, there was some variance as to the practice. In some cases a considerable uniformity of classes was observed as the result of customary and well established selling channels being in use by the industry. In other cases competition led to the creation of new classes for the purpose of quoting lower prices to certain types of accounts. In the food service brance of the electrical manufacturing industry, for example, at one time prices were on file for fourteen different classes of buyers -- including hotels, educational institutions, etc; one member having filed a price for a new class, other members would follow suit shortly thereafter.

Prices to fellow manufacturers within the same industry were generally omitted. Not infrequently prices to the government agencies were also omitted. In industries where manufacturers selling directly competed with those who distributed through jobbers and wholesalers, difficulties were often encountered in securing the filing of consumer prices by the direct sellers since the distributors with whom they competed were not required to file. In some industries members selling to mail order houses absolutely refused to file their prices to these accounts. In the plumbing fixtures industry members refused to file the terms of their forward contracts with mail order houses, even in confidence; they stated that there were clauses which nullified the contracts if their terms were divulged to a third party. Members of the code authority accused of failure to file such contracts gave the further explanation that publication of the very low prices would completely wreck the price level for the industry. As a technical defense against charges of code violation in failure to file, they in-

dicated that the contracts were on a cost-plus basis and that the transactions would not really be completed until the end of six months, when rebates were given to the mail order houses concerned. In the candy manufacturing industry members were very reluctant to file prices for certain "pet" accounts to whom they had been in the habit of giving substantial concessions. Likewise, in the wood cased lead pencil industry, the virtual refusal of members to file special discounts given to preferential customers was one reason why price filing in that industry was ineffective. Finally, prices to jobbers were frequently omitted upon the basis that they were under contract to one member and therefore not a part of the regular competitive market. However, despite all of the exceptions noted here, the evidence indicates that most typically members included prices or discounts in their filings for all classes of customers to whom they sold.

The replies from a questionnaire sent to former code authority secretaries confirms both the observation that all classes were generally included and indicates the nature of the infrequent exceptions that were made. These replies are tabulated below and represent experience in industries other than those included in the code sample.

The important factors accounting for failure to file prices for certain classes, or for at least a reluctance to file such prices, are of two kinds. In the first place, the fear that other buyers would insist upon receiving similar prices led to a dislike of making public the low prices granted to the most favored buyers. Also, no doubt, in some cases pressure was brought to bear by the recipients of these low prices to keep them secret. In the second place, members were unwilling to file prices to consumers or to certain intermediate classes when they were in direct competition with distributors who were not themselves filing their prices.

Industry	Customer Classes for Which Prices Ordinarily Filed	Customer Class for Which Prices Ordinarily Omitted
Asphalt & mastic tile	Contracters, dealers, consumers	None
Concrete mixer	Customer	None
Household ice refrigerator	All classes	None
Metal tank	Jobber, wholesaler, dealer & consumer	None
Motor fire apparatus	Consumer (chiefly municipalities)	None
Pulp & paper mill wire cloth	Consumer	None
Talc & Soapstone	Customers (chiefly manufacturers)	None
Transparent materials	Consumer, jobber, agent, broker, chainstore	None
Warm air furnace	Jobbers, dealers	Consumer
Wholesale monumental marble	Wholesalers	None
Card clothing	Dealers, users	None
Slide fastener	All classes	None
* Industry C	User, contractor, jobber	Distributor-under contract to one manufacturer.
* Industry A	Wholesaler, consumer	None
* Industry D	Consumer & intra-industry	None
Cutlery, manicure, implement, etc.	Jobbers	All others
* Industry B	Jobbers, manufacturers, catalog houses, retailers, consumers	None
Cutting die	Manufacturers	None
Perfume & cosmetic	Retailers, drug stores, department stores, beauty parlors, chain stores, syndicate stores, mail order, wholesale houses	Private brands not distributed by member
Power & gang Mower	Jobbers, dealers, retail	None
Road machinery manufacturer	Consumers	Distributors
Tool & implement manufacturers	Wholesalers	Dealers and consumers
Air filter	Jobbers, contractors, users	Distributors

(*) Requested to be kept confidential.

B. Geographic Scope of Filing.

1. Issues and Controversies.

Problems frequently arose in connection with the area to which filed prices should apply. When filings were made with one national agency, a question arose as to whether a single price must be filed to apply to the whole country or whether different prices might be filed for different locations. Some parties argued that filed prices should apply uniformly throughout the country. Others argued for localized filings, in order that members might sell at different prices in different regions as competitive conditions might necessitate. Where filing was with regional agencies, the problem of the relationship between the price filed by the seller in his home zone and his selling prices in "foreign" zones presented itself. Should a seller be permitted to sell in foreign zones without filing a price there? If he is not required to file in the foreign zone, must he observe his local price when selling outside of his own zone? If he is required to file in foreign zones in which he sells, must he file the same price as he has filed in his home zone?(*)

A far more keenly debated issue centered around the question of whether it should be mandatory for filings to be made only upon a delivered basis as opposed to an F.O.B. mill basis. From the standpoint of publicity it was argued that the filing of delivered prices was necessary to secure comparability of filings. It was asserted that in industries where shipping costs were large relative to other costs, the filing of F.O.B. prices, to which large but varying shipping costs had to be finally added, would provide publicity of limited value. And, alternatively, if shipping costs were added in filing, the result would be as many prices as there were destinations - a filing which would be too complex for practical handling or use.(**) Opposed to these arguments was the contention that the use of a mandatory delivered basis of filing would work to the detriment of many nearby customers, and furnish a device which necessarily controlled important geographical differentials in each company's price structure, and which might be used to establish collusive price uniformity.

2. Code Requirements.

The price filing provisions of the codes usually did not mention the geographical scope to which filing should apply. Twenty-two of the 444 codes provided for regional price reporting, with fourteen prescribing the regions to be set up. Twenty-five codes specifically permitted regional variations in price. Only four codes expressly required that filed prices be uniform for all regions. Only six codes contained regulations of sales in foreign zones by producers from other zones.

(*) The question of the relationship between the prices which an outside producer may file or quote in a foreign zone to the filed prices of members of that zone is discussed in Chap.IV, pp. 265-270.

(**) See minutes of code authority meeting of structural clay products industry, March 8, 1934; (In NRA files structural clay products industry.)

Likewise, only a very limited number of codes required the filing of prices on a delivered basis only.

5. Code Authority Expansion or Modification of Code Requirements.

As to the question of the area of price uniformity, in the industries in the code sample, most commonly regional variations were permitted --- either by stating in instructions that filings must specify the territory to which they apply or by accepting localized filings. Thus, a resolution of the code authority of the agricultural insecticide and fungicide industry on June 4, 1934, accepted filings for localized territories but required that the territories or zones established by each member not conflict with those based upon "natural trade conditions". The reporting form set up by the Carbon Dioxide Code Authority contained a space for entering the region to which the prices applied. A code authority bulletin of the coffee industry expressly stated that different price lists might be issued for different territories. Various discussions of the Funeral Supply Code Authority as recorded in the minutes indicate that they contemplated and acceded to the filing of different prices in different regions. The Macaroni Code Authority instructed members to specify regions, states, or sales territories to which their prices applied. The machine tool and forging industry permitted regional variations only to the extent that members might file special Pacific Coast prices. The executive authority of the bonus wrapping and packing division of the paper and pulp industry required that prices filed should be designated as to the zone or zones in which effective. The Valve and Fitting Code Authority at one time ruled against localized filings but subsequently a member asserted that the code authority was accepting them. (*)

In contrast to this more common practice, in a few industries code authorities required filings to be uniform for the entire country. The Plumbing Fixtures Code Authority took this position and charged Pacific Coast manufacturers who filed different prices in the East than in the West with violating the code. (**) The Fertilizer Code Authority permitted the filing of different schedules for different zones but an explanation issued by NRA required that prices for a given class of buyers must be uniform for all such buyers within the same area. (***)

With respect to the question of inter-zone relationships, no uniformity is evident in the rulings established by code authorities upon

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(*) Letter dated December 10, 1934, from Pittsburgh Valve and Fittings Company to G. V. Denny, secretary-treasurer valve and fittings manufacturing industry. (In NRA files, valve and fittings industry).

(**) Report of administration member, No. 12 to Division II, NRA, October 17, 1934, (In NRA files, plumbing fixtures industry,)

(***) Deputy administrator to Fertilizer Recovery Committee, April 1934. (In NRA files, fertilizer industry)

this point. In some cases it was specifically stated that each member in selling in another zone must file a new price in that zone and in each zone in which he sold. (*) Where this was done the code authority sometimes ruled that prices thus filed in foreign zones must not be below the producer's price in his home zone; this was commonly the attitude of the regional code authorities in the retail monument industry. In some industries where filing was upon a regional basis, members were allowed to enter other zones and sell there without filing a price in that zone; but it was indicated that they must observe the prices which they filed in their own zone in that case.

The codes vested little discretionary power with the code authority on the questionof F.O.B. vs. delivered basis of filing and quoting prices. Despite this fact these agencies frequently endeavoured to secure filings uniformly on a delivered basis, either through formal ruling, informal instructions, or by devising a reporting form in which such a method was called for. (**) NRA, though never having announced any formal policy statements upon this matter, usually opposed efforts to limit the freedom of individual sellers with respect to whether they would file F.O.B. or delivered prices. This was true whether the method proposed was to prohibit on F.O.B. basis (or delivered basis) or to make mandatory a delivered basis (or F.O.B. basis).

4. Performance by Members.

Little evidence is available concerning compliance by members with codal and administrative provisions regarding the area of price uniformity and inter-zone relationships. What indirect evidence has been found indicates that localized filings by members were quite prevalent but not more so than the filing of a single uniform price for the entire country. Likewise, as might have been expected, the filing of prices on a delivered basis was quite common, regardless of the action or lack of action by the code authority on that point. In the cast iron soil pipe industry most members actually filed on a Birmingham basing point. (***) A basing point system was alsoin operation in the cement industry, although not provided for in the code for that industry.

There is tabulated below the replies from former code authority officials in answer to a questionnaire regarding the geographical scope of prices filed and the basis upon which they were ordinarily filed.

(*) Minutes of 17th meeting of Administrative Committee of Fertilizer Industry, January 9, 1935.

(**) See Chapter IV, p. 256-266 for a discussion of the control aspects of mandatory filing of delivered prices.

(***) Reports by administration member to NRA, February 18, 1935. (In NRA files, cast iron soil pipe industry.)

Industry	Basis on Which Prices Ordinarily Filed	Scope of Prices Filed, If on F.O.B. Basis
Asphalt & mastic tile	F.O.B.	National
Concrete mixer	F.O.B.	National
Household ice refrigerator	F.O.B.	National
Marking devices	Delivered	
Metal tank	F.O.B.	National-larger members Regional-smaller members
Motor fire apparatus	Delivered	
Pulp & paper mill wire cloth	Delivered	
Sheet metal distributors	F.O.B.	Regional
Tile and soapstone	F.O.B.	National
Transparent materials	Both (depending on weight of shipment.)	National
Warm air furnace	Delivered	
Wholesale monumental marble	F.O.B.	National
Card clothing	F.O.B.	National
Slide fastener	Delivered	
Industry C(*)	Delivered	
Industry A	F.O.B.	Both
Industry D	Delivered	
Cutlery, manicure imp. etc.	F.O.B.	National
Cutting die	F.O.B.	National
Perfume and cosmetic	F.O.B.	National
Power and gang mower	F.O.B.	National
Road machinery	Delivered	
Air filter	Both	Regional

G. Mechanics of Collecting Prices.

1. Introduction.

A variety of decisions concerning rules or mechanical procedure had to be made in putting the price filing systems into operation. Most of these reflected no conflicts or issues over fundamental principles but the extent to which smoothly functioning plans of procedure were established and complied with by members went a long way toward influencing the ultimate effectiveness of the publicity plan as a whole. Among the more important matters relating to mechanics which were the subject of codal or administrative action were the following: Number of copies of price lists to be filed by members, methods of copying price lists, physical form of filings, procedure when revising part of filings, and methods of communicating prices to central agency and of acknowledgement by the latter.

(*) Requested to be kept confidential.

2. Code Provisions.

It was obviously impractical to attempt to include within the codes detailed rules covering the multitude of mechanical matters involved in the collection of price data. Where no definite grant of authority was given, it was probably assumed that such matters would be left to the discretion of the administering agency. Regardless of the possibilities of abuse, it was entirely impossible to avoid leaving a considerable field for administrative discretion. Aside from matters discussed in the earlier sections of this chapter, the only matter of pure mechanics involved in the collection of data which was covered to any degree in the codes was that of the number of price lists to be filed. Forty-four codes required that the number of price lists filed be equal to the number of the members in the industry. Only two codes required a number sufficient to supply a copy to all members and customers of the industry. Fifty codes specifically empowered the code authority to prescribe the number. The remainder of the four hundred and forty-four codes were so worded as to imply that only one or a very few lists needed to be filed. It should be noted that seventy-eight codes provided that complete new price lists should be filed whenever any kind of a revision was made.

3. Code Authority Expansion or Modification of Code Requirements

The absence of specific code provisions placed upon the administering agencies the responsibility for formulating necessary rules of procedure. In those industries where thousands of filings were handled each month by the central agency, it was found necessary to prescribe quite rigid and also very detailed rules. In other industries where the number of members was small and changes were less frequent, less formal and complicated arrangements sufficed.

One kind of ruling related to the number of copies of price lists that had to be filed. In some industries the code authority took upon itself to reproduce the prices by mimeographing or otherwise, disseminating either exact copies, a summary thereof, or notifying member of the receipt of filings by letter; in such cases members were required to file only one or a very few copies. This was true, also, where price data were not distributed beyond the central office. But more commonly members were required to file enough copies to supply all of their direct competitors; this resulted in requests for as many as one hundred copies.

More or less detailed rules were laid down concerning the physical form of the filing. A frequent requirement was that 8½" x 11" paper be used. It was uniformly required that filings be either printed or typewritten. It was often required that sheets filed be numbered serially throughout the year and, in some cases, paragraphs and sections also be serially numbered. The fertilizer industry specified the minimum size type to be used, whether printed or typewritten. In some cases it was required that paper below a certain minimum weight should not be used. Prices were generally to be reported on the letterhead of the firm filing. In some cases prices for different classes of buyers and for different products were required to be listed on separate sheets. Mechanical procedure for revising prices was prescribed, such as indicating for comparison new prices and previous prices: The fertilizer industry found it

expedient to require the filing of complete new schedules every time the slightest change was made in any term or price, regardless of the labor involved. On the other hand, the industrial alcohol industry required only that every three months members file completely new schedules, while changes made in the interim were simply entered as corrections on the schedule. In some cases only catalogues were accepted as the filing document; in others only price lists. The asphalt shingle and roofing industry permitted the filing of a merchandising plan to cover some of the terms of sale. (*)

More significant exceptions as to form were made in the paper distributing and retail monument trades where the code authorities in some regions or districts permitted joint or group filings, meaning that a single filing could be signed by a number of members; moreover, in the paper distributing trade members needed only to signify their acceptance of the lowest price on file by another member. The valve and fittings industry allowed members to adopt list prices of another member and file only discounts.

Generally, it was required that filings be transmitted to the central agency by first class mail. In some instances, however, it was provided that changes transmitted by telegraph and even by telephone would be accepted. Hours of filing were usually specified, with the precise date of filing being the time of receipt by the agency rather than the time of mailing. Where prices did not become effective until the filer received acknowledgement from the agency, certain rules of procedure were established. Sometimes acknowledgement was to be by telegraph, which in the fertilizer industry was to be sent collect. On the other hand the administration member was forced to criticize a ruling in the builders supplies industry which provided that filing agents should take at least forty-eight hours to examine, prepare, and record filed prices before acknowledging them; the code provision included no waiting period.

The uniform forms for reporting of prices, discussed at various places in this report were of course, the most significant of all of the mechanical factors concerned. In some cases they became far more than purely procedural aids. At least one-third of the industries in the code sample used them, though in some cases their use was suggestive and optional and not mandatory. Whether or not used as a part of a control mechanism, they were helpful in facilitating the mechanical operation of price filing.

H. Adherence to Filed Prices.

1. Issues and Controversies

The question of adherence to filed prices involves the whole

(*) For further example of the setting up of elaborate and complex rules of procedure relative to the mechanical operation of price filing, see the bulletin issued to members by the Folding Box Authority in Appendix C, Exhibit IV

question of the accuracy of the information filed. If the selling prices of members bear no relationship to the prices which they have reported to the central agency for distribution to members, the collection and dissemination of such prices fails to throw light on actual pricing policies and the end of publicity is thus defeated. It is not too much to say that the filing of prices then is actually harmful, for the absence of information is better than copious information which is misleading to competitors and others.

It is necessary at this point to draw a distinction between "performance" and "adherence". By the former term is meant compliance with the codal and administrative requirements established, whether they prohibited only those sales which were below filed prices or prohibited sales either above or below filed prices. "Adherence" refers to the selling below filed prices--regardless of requirements or performance relative to sales above filed prices. In a good many cases members sold above filed prices; in some cases this represented a violation of requirements and in other cases it did not. Quantitative evidence bearing upon the precise extent of such practice is lacking because of the fact that less emphasis was placed upon it in administration than in sales below filed prices. However, from the standpoint of the publicity function of price filing, the same inaccuracy results when sales are made above filed prices as when made below. The fact was recognized in NRA policy making, for Office Memorandum No.228 forbade sales at prices not in accordance with those filed. The discussion in this section is chiefly concerned with the question of adherence to filed prices, that is - whether or not members sold below filed prices. The omission of experience relative to sales above filed prices, is of course, less significant to the extent that minimum prices is practice became actual prices.

Another issue centered around exemptions granted or requested from the requirements of adherence. These exemptions were not frequently concerned with sales of certain special goods, generally of sub-standard quality. The manner of meeting competition of another member who was selling at lower prices --- whether by filing a new price or by selling below filed prices --- also was the subject of controversy and rulings.

It should be noted that the question of adherence arises only when prices were actually filed. Where there was no compliance with the basis requirement to file in the first place, the question of the degree of adherence was non-existant. The discussion below thus applies only to those members who filed, regardless of the degree of original participation.

The practice by members in various industries of selling by means of "firm" contracts created an issue which caused much controversy. These contracts involved the guarantee by the seller of a stipulated price for purchases made over an extended period of time. In some cases, as in the so-called "open-end" contracts, no limit was placed on the duration of the offer or upon the volume of purchases which could be made under it. In entering into these contracts, members

obligated themselves to supply goods at the contractual price regardless of subsequent changes in their other prices. Thus, although the contract may have originally been taken at the current price on file for the member, when filed prices were changed shipments made under this contract were still billed at the previous price. When the filed price was raised, shipments at such prices thus represented a type of non-adherence. The same situation prevailed after the establishment of price filing plans with respect to contracts which were in existance before the code. This failure of actual prices charged to correspond with filed prices lessened the publicity which might otherwise have been achieved.

Considerable controversy between members in certain industries was engendered over this point. Those members who sold on a long term basis or with price guarantees were unwilling to abandon this practice, asserting that they would lose customers if they could not grant such inducements. On the other hand other members were equally insistent that the practice should be restricted because of the indirect concessions involved which prevented full information regarding pricing policies. It was proposed by the latter members that there should be written into the codes limitations on the length of forward contracts with fixed prices or on the duration of price guarantees. This was done in a number of cases. Where this solution was not available, an effort to secure the filing of such contracts and their dissemination along with other price information filed. In those cases where the contractual price was a maximum price only and where there was a provision for rebating later to make adjustments for price declines, even the filing of such contracts did not provide full publicity. Members, too, were often reluctant to file such contracts for the reason that it would reveal the names of their customers and other intimate details of the transaction.(*) Price publicity is lessened wherever long term contracts are in use by some members or wherever it is common to extend price guarantees, unless provision is made for the filing of such contracts and guarantees and of all rebates granted thereunder.

The problem of adherence to manufacturers' filed prices by distributors, arose in those industries where different channels of distribution, were used side by side by members in the same industry.(**) In some cases part of the members sold directly to dealers while others sold to jobbers or to wholesalers who resold to dealers; the competition of jobbers or wholesalers then presented a problem to those members selling directly to dealers. In orther industries part of the members sold directly to consumers while others distributed through middlemen of some sort; here the pricing policies of all middlemen including retailers were matters of concern to direct sellers. Thus, the issue

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(*) See Section E of this chapter for a discussion of this issue from the standpoint of the filing of contracts taken at a very low price.

(**) The question of whether or not distributors should adhere to the filed resale prices of manufacturers should not be confused with that of whether distributors themselves should file prices with the manufacturers' code authority, as discussed above in Section II B.

was whether distributors should be required to adhere to the filed resale or list prices of members. Direct sellers of course were the most vocal in proposing such adherence. Their argument was that publicity of their prices for direct sales was unfair to them if the prices of all competitors in their market were not publicized; and unless distributors filed prices, such publicity could be achieved only if they adhered to the resale or list prices filed by manufacturers.

2. Code Requirements.

Two hundred and forty-four codes required that members sell at the prices and terms which they had filed and prohibited deviations above or below. On the other hand, one hundred and sixty-eight codes prohibited members from selling below their filed prices or upon more favorable terms, and thus by implication permitted sales above their filed prices or at less favorable terms. There are no codes which permitted members to sell at any time below their filed price, since such a provision obviously would render the price filing system meaningless. However, twenty-three codes permitted sales as low as the lowest price on file, even though this price was below the filed price of the member himself; under the provisions of the other codes, in order to achieve the same end, it would have been necessary to file new prices. Likewise, fifteen codes permitted the sale of certain specified types of substandard goods below filed prices, which under other codes could only be accomplished by filing separate prices for such goods.

As for the matter of adherence by distributors to the filed prices of manufacturers, five manufacturing codes prohibited sales to buyers not adhering to manufacturers' published prices; seven manufacturing codes required members to enter into contracts with buyers which bound the latter to adhere to the manufacturer's published prices; seven codes prohibited sales to controlled sales representatives (agents, brokers, affiliates, etc.) who did not so adhere, and four codes required contracts with them which would force them to adhere. Finally, five distribution codes prohibited sales by members at other than the manufacturer's published prices.

3. Executive Order No. 6767.

On June 29, 1934 and Executive Order was promulgated which provided that sellers in any industries with price filing could quote and sell to federal, state, or municipal governments at prices as low as fifteen percent below filed prices. Provision was also made that if this tolerance resulted, in the judgement of the Administrator, in destructive price cutting, said administrator might reduce the tolerance to as low as five per cent. This order thus effected a limited exemption from adherence requirements, an exemption traceable to the federal government, rather than the administering agency of the industry.(*)

4. Code Authority Expansion or Modification of Code Requirements.

Little evidence was found that code authorities varied to any

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(*)For a longer discussion of this order, see Chap. VI, pp. 477-483 below.

important degree the code requirements concerning adherence to filed prices. The most frequent case was that in which the code authority instructions seemingly required the reporting of actual prices whereas the code called for the filing only of minimum prices and the most favorable terms. For example, the Cordage and Twine Code Authority, whose code called for actual prices, specifically required its members to file a new price if they wished to sell a certain customer above their prevailing filed prices. (*) As a rule the code authorities simply transmitted in their instructions the adherence requirements set forth in the code.

Aside from regulations concerning general adherence by members to filed prices, various rulings were made by code authorities relative to adherence under certain special circumstances. One group of these rulings permitted the sale of types of substandard goods below filed prices; occasionally it was required that such sales had to be reported to the code authority after they were consumated.

The Plumbing Fixtures Code Authority permitted sales below the member's filed price to meet competition; but in most industries members were instructed to file new and lower prices if they wished to meet lower prices of competitors.

Aside from interpretations of Executive Order No. 6767 permitting sales to governments at fifteen percent below filed price, no cases were found in which code authorities arbitrarily ruled that certain special buyers within a given class could be sold below filed prices--excluding, of course, those classes of buyers prices to whom may have been exempted originally from the filing requirements.

The field in which code authorities most commonly attempted to expand the code requirements was that of adherence by distributors of the industries. Code authorities in a number of industries more or less aggressively tried to secure adherence of distributors to the filed prices of manufacturers or attempted to secure what is more commonly known as resale price maintenance. (**)

5. Adherence of members.

Types of evidence lead to a classification of industries into four groups, based on the relative degree to which members adhered to filed prices. The first group includes those industries in which adherence was practically one hundred percent. Thus in the agricultural insecticide and fungicide industry, the administration member on May 2, 1935, reported to NRA that all but one member of the industry were abiding by their filed prices and discounts. The administration member for the carbon dioxide industry reported to NRA on May 6, 1935, that all members had been adhering, although there was a tendency on the part of small members to break away as the extension of the code became uncertain.

(*) Letter dated August 10, 1934 to Cordage and Wrapping Twine Division. (In NRA files, cordage and twine industry.)

(**) This subject is discussed fully in Chapter IV, p.p. 280-313.

Similar reports on about the same dates were made by the administration members of the industrial alcohol and salt producing industries, although in the latter industry a few exceptions were noted. The manager of the Vitrified Clay Sewer Pipe Code Authority stated in a code authority meeting on November 27, 1934, according to the minutes, that there were practically no cases where members had refused to observe their filed prices. The other industries in which virtually one hundred percent adherence existed were: copper, copper and brass mill products, cement, electrical manufacturing, ladder, machine tool and forging, metal lath, metal window, nottingham lace curtain, and the mechanical rubber goods division of rubber manufacturing. (*)

Under another group may be classified slightly more than one-fourth of the industries studied. In these adherence was fairly general, ranging from perhaps fifty to ninety percent, with those not adhering representing a minority. This was true in the fertilizer industry, for example, where long delays in meeting price changes of competitors, as noted in an intensive study of actual filings, were explained by the fact that members went ahead and sold below their own filed prices without bothering to file new prices which met the competition. (**) A letter from the administration member reporting a code authority meeting in the cast iron soil pipe industry on March 20, 1935, states that the code authority believed that a number of companies were selling below filed prices. Adherence in the business furniture industry was quite good with the exception of a minority group, until the competition of distributors led to general non-adherence and ultimately a stay of the adherence requirements themselves. Likewise, in the cordage and twine industry, adherence was good until competition from prisons and from the Philippine Islands led to a complete breakdown. Other industries falling into this main category were: asbestos, asphalt shingle and roofing, builders' supplies, carpet and rug, crushed stone, farm equipment, fire extinguisher, folding paper box, funeral supply, gas appliances, paper and pulp, scientific apparatus, shovel, dragline and crane, steel castings, tag, and valve and fittings.(***

A third group of industries includes those in which adherence was quite poor, somewhere below fifty percent, on the part of those who filed initially. In the baking industry posted prices were, of course, closely followed when posted publicly; but adherence to schedules filed with the national bakers council was poor. The secretary of the coffee industries committee stated in an interview that towards the end of the code period at least seventy-five percent of the industry could have been cited for non-adherence; this he explained by the failure of NRA effectively to prosecute the early violators. In the macaroni industry, and particularly in the New York area, large numbers early in 1935 were failing to abide by filed prices; this was accomplished in many cases

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(*) The sources for this statement are chiefly NRA code histories and verbal statements of NRA staff members intimately connected with the operation of the codes in these industries.

(**) Whitney, Simon, Fertilizer Industry Price Study, Trade Practice Studies (Division of Review, December 15, 1935). p. 58.

(***) The sources for this statement are chiefly NRA code histories and verbal statements of NRA staff members intimately connected with the operation of the codes in these industries.

through the giving of premiums, frequently of considerable value, although the code contained a provision restricting the use of premiums.(*) In the plumbing fixtures industry, non-adherence was most widespread in the brass group. But in other groups as well, the effort to meet the competition of wholesalers who did not file prices and the provisions permitting sales below filed price to meet prices of other members selling below filed prices, eventually led to a cumulative disregard of filed prices which culminated in a complete breakdown of the plan. Other industries in which adherence was poor were: envelope, mayonnaise, paper distributing, ready mixed concrete, retail monument, footwear and heel and sole divisions of rubber manufacturing, set up paper box, structural clay products, and wholesale confectionery. Compliance with the initial requirement to file prices was poor in these industries, a fact which discouraged those members who did file from careful observance of their filed prices.

The fourth group comprises industries in which there was little or no adherence, reflecting chiefly the fact that very few members ever actually filed their prices. This group includes canvas goods, marble quarrying and finishing, (**) marking devices, medium and low priced jewelry, retail tire and battery, and wood cased lead pencil.

The above classification is based upon the degree of variation between prices and terms reported and the prices and terms at which sales were made. Thus, there is omitted the entire field of evasion--where members reduced prices to buyers through granting indirect or secret concessions which were not embraced by the price filing system. The ways in which sellers could effect indirect and secret concessions are almost limitless and there is evidence that many of them were resorted to. Varying one of the credit terms, excessive product guarantees, open-end contracts, conditional sales, giving free goods and premiums, special accessories, equipment, or services, diversion of brokerage or commissions, excessive allowances, selling of first quality products as substandard, accepting securities in payment at excessive valuations--each of these constituted in effect a method of reducing prices which, unless specifically included in the open price system, might render the information filed and the adherence thereto of limited value. Where there was a real desire on the part of industry members to evade the filing requirements by resort to such methods, the administrative agency had little recourse except to extend the filing requirements to the point of homeless complexity. No factual summary can be made of the amount of such evasion, but that it was general in some industries is borne out by the very considerable extension of filing requirements by code authorities to cover various forms of indirect pricing and by the frequency of reference made to secret rebating and price concessions.

With respect to performance under Executive Order No. 6767, there was a tendency for competition to drive quotations to the government down to the full fifteen percent tolerance allowed. In some industries tacit agreements not to take advantage of the tolerance succeeded for a time but eventually broke down. Full publicity was of course defeated to the extent that there was uncertainty as to the tolerance granted in

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(*) Memorandum dated January 1, 1935 from Assistant Deputy R.S.Scott to Deputy W.M.Stevens, (In NRA Files, macaroni industry).

(**) This industry operated a successful bid checking system, however.

quotations to governments. In industries where governmental units constituted the greater part of the market, a period of time after the issuance of the order elapsed during which filed information was of limited value. Where actual quotations eventually settled uniformly at fifteen percent below filed prices, whether or not new and higher base prices were filed for governments, the informative character of filings were restored and price publicity was again possible. There remained, however, the same limitations that existed when members were required to file only minimum prices; namely, that members might at any time sell above the figure of fifteen percent below filed prices.

Full adherence of distributors of industry members to filed prices of manufacturers was not very common in the industries studies. The issues of price control raised by this problem are treated critically in Chapter IV. Note may be made of the fact, however, that non-adherence of distributors to manufacturers' filed prices was prevalent and caused difficulties in the following industries falling in the code sample: asbestos, business furniture, farm equipment, floor and wall clay tile, copper and brass mill products, fire extinguishing appliance, plumbing fixtures, auto fabrics division of rubber manufacturing, valve and fittings, and vitrified clay sewer pipe.

III. DISSEMINATION OF PRICE INFORMATION UNDER NRA

The collection of data is the first basic step in accomplishing price publicity, but the extent to which genuine publicity is ultimately secured depends more directly upon the actual extent and nature of the dissemination of such data. No matter how thoroughly and completely information is assembled in a central point, if it is not distributed in intelligible form over a sufficiently extended area, the objective of publicity are defeated. The thoroughness with which information may be collected depends finally upon the cooperation furnished by all of the members of the industry. But the responsibility for the success or failure of dissemination rests upon the central agency, for this constitutes the chief function of such an agency. Failure to secure the fullest dissemination, at least as required by the code, may be due either to an incompetent agency, to a lack of interest in publicity, or to a deliberate effort to sabotage the objectives of publicity.

A. Issues and Controversies

The main Issues relating to dissemination center around (1) the procedure, (2) the parties who receive the information, and (3) the information disseminated. These issues existed in the case both of industry members and customers. The issue with regard to the procedure for dissemination was whether it should be automatic, in which case information was sent out without cost as soon as it was received; whether it should be sent only upon request or payment of the costs of dissemination, or whether it should be confined to inspection of the price files of the central agency. The second issue involved the question of whether information should be disseminated (1) to all members or customers, (2) to producers or buyers of products similar to those on which filing was made, (3) to producers or customers located in the same region as the filer, or (4) to producers selling the same customer class or buyers in the same class as that for which prices were filed. Finally, there is the question of whether all filed information should be disseminated or whether only certain partial information should be released---such as the lowest price filed, prices to part of the customer classes, a list of changes without details, etc.

The manner in which these issues were worked out in the different industries studied is discussed in this section. These actions reflected the attitude of the code authority of the industry toward the issues cited above. Aside from the occasional objections to dissemination to customers, few formal pre-code statements were made which reveal early attitudes regarding the form of dissemination. With respect to buyers the president of the National Confectioners Association stated, at the code hearing, that

> "(it was) of no special value to the great number of buyers who, from the standpoint of curiosity, like to know what prices suppliers are furnishing them with. It would create endless controversy, shifting of buyers between wholesalers, and endeavours to chisel wholesalers. ... Knowing retailers, the benefit would be cancelled by bickering and disturbance by

customers to get the wholesalers to reduce prices." (*) Likewise, the Code Authority of the Ladder Industry objected to including Office Memorandum No. 228 in the Code with its provision for dissemination to customers, stating that it was not "one distributor's business what prices were quoted to other distributors", and that confusion and dissatisfaction would result if price information were supplied to buyers.

With reference to one issue frequently raised in connection with dissemination, there was no variety of experience under the NRA. This is the question of whether or not the member filing information should be identified in the dissemination of that information. It was argued in support of such a practice that, unless products were completely standardized, publicized prices would have little value where members did not know to what member's products they applied, and that buyer misrepresentation of prices could not be prevented if members could not ascertain which were the filed prices of the various competitors. On the other hand, it was argued, chiefly by the Consumers Advisory Board, that identification facilitated coercion of sellers who filed prices which were regarded as being too low. The Federal Trade Commission had taken a similar position in regard to dissemination of past prices and trade statistics.(**) In practice, however, this issue was largely ignored since no restrictions on identification were written into the codes. From the available evidence it appears that filing members were always identified, except in the paper industries, where only the lowest filed price was disseminated, and in the nottingham lace curtain industry. Consequently, this issue is not pursued further in the discussion of publicity. Identification of filers was an integral part of the type of price filing established under NRA codes.

B. Dissemination To Members

1. Code Provisions

Code provisions defining the members of the industry to whom prices should be released were of major importance. One hundred and sixty-four codes, or somewhat over one-third of the price filing codes, required, without further qualification, that the central agency send out the filed information to all members of the industry. One hundred and ten other codes limited such distribution to manufacturers of products similar to those for which prices were filed; that is, if a member of the industry did not produce certain products on which fellow competitors filed prices, he was not eligible to receive these filed prices. Ten codes specifically restricted the distribution to members of the same region. Eighteen codes provided that distribution was not to be automatic but only upon a specific request made in each separate instance.

(*) Statement by Mr. Williamson, President of National Confectioners Association, Transcript of Hearing, pp. 267 ff., NRA files

(**) Open Price Trade Associations, (1929), page 369.

Finally, ten codes required that prices be distributed to members upon the payment of the costs involved in preparing and mailing the information. Thus about seventy percent of the price filing plans provided for some type of distribution of filed data to the competing members of the industry.

Of the remaining thirty percent of the codes, one-half, or sixty-eight, required the agency to make price filings available for inspection by members at the central office. Eight codes left the matter of dissemination to members entirely to the discretion of the code authority. Finally, sixty codes failed to provide for any type of dissemination to members. It is evident that if the code provisions were exactly adhered to, price filing under these sixty codes need not have produced any publicity of prices whatsoever. The effectiveness of the price filing plans as instruments for securing price publicity was also limited by the scope of dissemination, as noted above, and by various obstacles placed in the way of full dissemination, such as distribution of prices only upon formal request, requiring prepayment of costs, and permitting inspection only at the central office (perhaps hundreds of miles distant).

A few codes provided for certain substitute methods of effecting dissemination either in addition to or in lieu of filing with a central agency. Two codes required, in addition to filing, that members send copies of their price lists directly to all fellow members. Eight codes specified that members must "post" prices in addition to filing. Likewise, eighty-eight codes required that prices be "published" in addition to filing. Four codes which contained no provisions for the filing of prices required that members post their prices in a conspicuous place. One code without price filing required that members exchange prices directly, and one other specified that prices must be published in a trade periodical.

Despite the complexity of code provisions concerning information to be filed, little detailed instruction was specifically given in the codes as to what information was to be disseminated. Presumably, in most cases it was assumed that whatever information was filed should be disseminated, not in summary form but so as to include all prices and terms of sale filed by each and every member. Two codes provided that only the lowest price on file for each product should be disseminated. Nine codes specifically prohibited the addition of comments by the central agency in the dissemination process.

The codes were typically silent upon thequestion of whether or not the party filing the information should be identified in dissemination. No codes providing for the filing of current prices prohibited the identification of filing members. Seventy-five codes apparently made such identification mandatory; while eight codes made it optional with the code authority. The rest of the codes, well over three-fourths of them, did not allude to this matter at all. Presumably the central agency, at its own discretion, might release the names with the data or else compile an unidentifiable summary as it chose.

Considerably over half of the codes required that the central agency, in distributing prices to members, send them "immediately" or "promptly". On the other hand, eight codes provided that the dissemina-

tion be by mail. The remainder of the codes contained no provision upon this subject. The presence or absence of such provisions was of particular significance where members of a highly competitive industry were widely scattered, so that a difference in time of receipt might work to the disadvantage of distant members. Seventy-six codes prohibited the releasing of information to any member or members until released to all members concurrently.

2. Performance by Agency (as Conditioned by Code Authority Rulings and Industry Vote)

A discussion of the performance by the central agencies of the dissemination function should round out the factual answer to the question of the amount of publicity realized under NRA price filing plans. The amount and nature of the information actually filed by members and assembled with the agency, of course, represented the upper limit to the amount of information that central agencies could disseminate. Consequently, the discussion following relates to the dissemination of such information as was successfully assembled. In this case the formal rulings of the code authority and its actual performance are practically indistinguishable; the evidence, accordingly, is based partially on announced rules and in other cases upon concrete performance. Although in several instances agencies did not always adhere entirely to their announced policy, this was too infrequent to warrant separate treatment of rules and performance.

In some of the industries of the code sample, full price information was automatically sent to all members of the industry who had filed prices, without charge and without requiring specific requests. In the asphalt shingle and roofing and the ladder industries, the code authority simply mailed out to all members the actual physical price lists submitted by members. Also, in the industrial alcohol and nottingham lace curtain industries, copies of all information filed were automatically sent to all industry members; in the former industry, members received copies of the price lists of members of the hardwood distillation industry as well. Copies were rotoprinted in the envelope industry and sent out to all members. In the steel castings industry, the code authority sent out daily a bulletin to all members notifying them of changes made by any producer, with symbol references to a master industry price list which conveyed the nature of the change; quarterly summaries were also issued which recapitulated prevailing prices for each of the products. The sales clearing agent of the copper industry distributed prices to all members. In the fertilizer industry members mailed price lists directly to all other members in the same zone, while filing one copy at the same time with the National Fertilizer Association; the association also sent daily to each member a list of all revised schedules filed. The codes for carpet and rug and metal lath industries required that all data filed be sent to all members; but no evidence is available concerning the extent to which this was done.

Full and automatic dissemination was also provided in other industries but only to members producing products similar to those upon which prices were filed. This was the general policy in the electrical manufacturing industry but the diversity of products often made such

limitation difficult to apply, so that schedules were often sent to members not producing the given products. Many bound and unopened filings were found in the files of the national electrical manufacturers association in the course of the NRA price filing study for that industry which indicates that dissemination did not always take place. The code authority of the fire extinguishing appliance industry wired all producers of similar products regarding changes of any member. Members in the folding paper box industry were required to "register" for various products and customers, when registered, received all revisions of prices and terms filed by other members in connection with such products. In the gas appliance industry, producers of heaters, boilers, furnaces, conversion burners, radiators and thermostats received from the code authority duplicate copies of all price lists for such of those products as they produced; dissemination on other products of the industry was not automatic but was only upon request. In the machine tool and forging industry, actual price lists filed by members were sent to all direct competitors, the list of such competitors being submitted by the member who filed. In the automobile fabrics division of rubber manufacturing the code authority sent to producers of similar products a letter transmitting all details of changes as soon as they were filed. In addition, in the paper & pulp, tag and farm equipment industries, dissemination was restricted by the codes to producers of similar products.

Dissemination in some cases was confined only to members located in the same region as the filer. In the fertilizer, crushed stone & cement industries full information was sent to members selling in the same region; statements made by twenty-one regional code authorities of the crushed stone industry to NRA field staff members indicate that in all but one region, the Omaha district, prices were sent out regularly and promptly to all members of the region. Partial dissemination to members of the region existed in the funeral supply, retail monument and wholesale confectionery industries. The codes for carbon dioxide and ready mixed concrete provided for full dissemination to all members of the region but evidence is lacking as to performance.

In three industries studied, it was the announced policy of the code authority to send full information to all members, but occasional complaints from members indicate that at least some of the members who filed prices did not regularly receive the filings of others. These industries were business furniture, cast iron soil pipe and shovel, dragline and crane. In the second industry the complaint was made that prices were not sent to those who failed to use a prescribed uniform filing form which was not sanctioned by NRA.

In a large group of industries, there was automatic dissemination to all members, but the information forwarded was not as complete as that filed. In the asbestos industry prices filed to equipment manufacturers were not distributed. In the funeral supply industry, where over 10,000 filings were received on the original price call and members complained of the volume of data received, it was decided to distribute only prices on staple and highly competitive items. However members were permitted to inspect all filings and could be sent upon specific request any data required; NRA approved charging for such additional data when the services requested exceeded an amount agreed upon by the code authority.

The Code Authority of the Mayonnaise Industry sent out letters summarizing changes filed without giving details; moreover, local changes were not thus distributed but local producers could inspect them at regional offices. In the metal window industry initial revisions of discounts were distributed but not those filed to meet revisions, and no attempt was made to distribute day-by-day discount schedules as received. The code authorities in the paper distributing trade sent out only the lowest filed price and a representative medium price to all members who had paid their assessment; a six dollar annual charge was made to wholesale grocers for continuous service on such dissemination. In the plumbing fixtures industry all data were sent to all members except the special discounts to special buyers. In some regions of the retail monument trade it was decided not to disseminate prices which were more than fifty per cent off list. In the tag industry only the lowest price and the most favorable terms filed by any member on a given product were sent out. The Code Authority of the Valve & Fittings Industry distributed a bulletin notifying members that changes had been made but giving no details. In the vitrified clay sewer pipe industry, the code authority distributed condensed analyses of each member's filings.

Another type of procedure used in some industries involved automatic notice to all members of changes, with the opportunity of getting further information upon request. Thus, in the agricultural insecticide & fungicide industry a letter was sent to all members listing schedules filed; members could then notify the code authority as to which ones they wanted and it would mail them out or wire the data as requested. Likewise, members in the macaroni industry were notified of changes and could obtain desired data by request. A bulletin was periodically sent out to all members in the wholesale confectionery trade listing all revisions, copies of which were available to members at ten cents a copy. The Farm Equipment Institute issued weekly to all members a "Price Change Bulletin" which listed members, dates, and products involved in revisions during the week but which contained no price data; it was stated therein that producers of similar products could inspect new schedules at the institute office. A ten dollar annual subscription price was charged for this bulletin which was included in the institute's dues.

This concludes the list of industries in which information or notification was sent to all or some of the members automatically except where the central agency deviated from its announced policy. In a number of other industries information was sent out only upon request but without notification of new filings. This was true in the coffee industry where filings were supplied by mail, telegraph or telephone, as requested; the secretary of the code authority stated in an interview that few requests were ever made since changes were rapidly communicated by salesmen. In the copper & brass mill products industry in addition to supplying filings on request, inspection of filed data was permitted. Prices were sent out in the retail monument trade only upon request and upon payment for costs of copying; the code authorities reported that few inquiries were made. The Set-Up Paper Box Code required that prices be furnished members on request but no evidence is available as to performance of the code authority on this point.

Similar arrangements were made in certain other industries, excepting that the requests had to be for a specific filing by a particular manufacturer on a designated product. This was the situation in the builders' supplies industry, where the local agencies were confidential agents; inspection and oral dissemination were forbidden in favor of mail and telegraphic dissemination. A charge of ten cents per page was made for filings requested. In the candy industry, members could obtain from Dun & Bradstreet filed prices only for the classes of trade to which the members sold and all requests had to name the filings of specific manufacturers. A charge was made for such information, either at so much per page or on a flat rate per manufacturer for continuous service, regardless of the number of items. Telephone requests were granted upon proper identification. A report made by Dun & Bradstreet at the end of the first three months of price filing stated that 162 members had made inquiries in three months for prices of only thirteen firms, and that sixty percent of the requests were for full lists and the remainder for partial lists or specific items. No inspection of the files was permitted.

Similar limitations came to exist in the macaroni industry, where members had to specify the manufacturer the product and the grade in requesting prices; this was made necessary by the large volume of general requests which overtaxed the facilities of the code authority. In the scientific apparatus industry, product and manufacturer had to be specified in requests and a five cent charge per page was made for photostatic copies; data were given only in writing and not transmitted by telephone. In the underwear industry, members had to state the reason for the request and no specific prices were given out, the agency only stating whether the particular price in question was above or below the one stated by the inquirer. No information was regularly disseminated by the Code Authority of the Salt Producing Industry but a few special requests were supplied.

Prices were not distributed in any of the other industries studied; inspection was permitted in a few, however. In the canvas goods industry the code authority only permitted inspection of prices at its office. The structural clay products code required that prices be "available" to members, but there is no evidence as to how they were made available. The National Bakers Council permitted inspection of its files by members having a "legitimate interest" therein and reported that very few inquiries were made by members to see the filings. It should be noted, however, that posting of prices was required of members which provided some publicity to other members. The Cordage & Twine Code required prices to be "available to any one in interest" while the Floor & Wall Clay Tile Code permitted "inspection by interested parties" but evidence is lacking as to the manner in which these provisions were carried out.

No release of filed data, either through distribution or inspection was effected in the remaining industries studied. This was true in the marking devices industry where it was stated that dissemination would be too expensive; members were, however, required to post prices. In the Retail Tire & Battery Code no provision was made for dissemination to members, and no evidence was found that the central agencies did release any filed information. No dissemination was effected in the

marble quarrying & finishing, medium & low priced jewelry and wood cased lead pencil industries because no worth-while amount of data was ever filed.

Thus it may be seen that in half of the industries studied, fairly effective publicity to members was achieved through complete dissemination or through the possibility of obtaining data by request. In some of the other industries, price publicity was partially defeated by the withholding of certain types of information from members. In other industries, obstacles placed in the way of widespread dissemination interfered with price publicity -- the inability to request any but very specific data, the expense of dissemination involved, or the need to go to the agency office, perhaps in a distant city, to obtain the information. Of course, the objective of price publicity was absent in those price filing systems where there was no dissemination.

The few requests for information reported in those cases where information was disseminated on the basis of requests or inspection is of significance to the question of the ultimate value of price publicity and is discussed further in later sections of this chapter.

C. Dissemination to Customers

1. Code Provisions

True price publicity requires that filed information be released to buyers of the industry products as well as to sellers. Code provisions, however, did not effectively provide for this type of publicity. Only two codes required that filed data be sent regularly and automatically to all customers. About one hundred codes required such dissemination upon request and upon payment of the cost involved. Two hundred and eleven required that the filings be made available for the inspection of all customers in the central office. Twenty-three other codes permitted such inspection but expressly stated that each customer might see only those prices for the customer class to which he belonged. Eleven codes left the matter entirely to the discretion of the code authority. Finally, one hundred and fifty codes failed to make provision for any kind of dissemination to buyers.

Eighty-eight codes required that the filed information be released to customers at the same time that it was released to members of the industry. Only two codes specifically provided for release to customers at a date later than that of the release to members. On the question of time of release to customers the other codes were silent.

2. Performance by Agency (as Conditioned by Code Authority Rulings and Industry Vote).

Although not universally conceded, one of the prime functions assigned to price filing is that of increasing buyers' knowledge of prices to the end that they may buy more intelligently and that discrimination may be lessened. The codes, however, failed to require full publicity to buyers. In practice, as is evidenced below, only a very

limited degree of dissemination to buyers was achieved in the industries included in the code sample.

There were no instances where the central agency automatically forwarded filed data to all customers. In a few industries, information was, however, mailed to customers upon request. The carbon dioxide agency, according to the administration member, responded to the few inquiries from buyers that came in. The Code Authority of the Copper & Brass Mill Products Industry stated that information would be sent upon request to customers or others "having need for such information" and that inspection of files would be permitted under similar circumstances; it also instructed members to notify their own distributors immediately of changes in price. Code authority minutes for the industrial alcohol industry indicate that prices were furnished to customers upon request. A questionnaire answered by the former secretary of the scientific apparatus code authority states that prices were mailed to customers when requested and upon payment of the costs thereof and that inspection of the files was permitted but that very few such requests were ever made.

The codes of certain other industries required that filed price data be furnished customers on request but adequate evidence is lacking as to how extensively this was done. In the envelope, paper & pulp and paper distributing industries the supplying of information was limited by the code to "persons concerned"; in folding paper box to "non-members"; and in the set-up paper box and wholesale confectionery to "buyers". It was required that buyers pay for the cost of answering requests in three of these: envelope, folding paper box and wholesale confectionery. Inspection of filing was also provided for in the latter code. Fragmentary evidence indicates that the code authorities in the paper industries were generally willing to release information to customers but that where only the lowest filed prices were disseminated even to members, the customers readily obtained the information elsewhere.

In three industries information was sent to customers on request but it was confined to prices filed for the class of buyer to which the inquirer belonged. Thus, the regional confidential agents in the builders' supplies trade were instructed by the national code authority to restrict dissemination in this way and then only when the request named a specific filer; a charge of ten cents per page was prescribed. Inspection and oral dissemination was prohibited. Likewise, in the candy industry where dissemination was confined to "direct buyers" requests to Dun & Bradstreet had to specify the prices of a particular manufacturer, and prices applying to the inquirer's classification were sent; a charge was made, either per page or a flat rate for continuous service, on the filings of a manufacturer, regardless of the number of filings. The Dun & Bradstreet report, issued after the first three months of operation stated that only three direct buyers had requested information during this period. In the copper industry only the signers of permanent buying agreements were upon request given the basic prices of a specified member. The clearing agent published the average weighted prices filed in newspapers daily.

Some agencies permitted inspection of the prices at the office of the central agency but would not send out prices on request. Thus the National Fertilizer Association emphasized that its price files were open to anyone but various regional offices reported that few requests for inspection were made. The Metal Window Code Authority permitted inspection by interested parties but the former secretary, in replying to a questionnaire, stated that very few parties applied for inspection. The crushed stone filings were available for inspection by customers at the offices of the regional code authorities; statements by twenty-one regional code authorities to NRA field staff members indicate that in about half of the regions customers made frequent use of this privilege, while in the rest there was little or no inspection. The Ready Mixed Concrete Code required that filed data be "available for public information" but there is no evidence as to how fully this was carried out.

The National Bakers Council permitted persons having a "legitimate interest" in the filings to have access to their price files but noted that there were only a few inquiries made. Many members, in addition posted copies of their price schedules in their places of business, as requested by the council, which presumably resulted in some degree of publicity to customers. The codes of four other industries, cordage and twine, floor and wall clay tile, metal lath and retail monument provided that prices should be available to anyone "in interest" or "interested" but there is no evidence as to the degree of inspection actually permitted.

Limited inspection by customers of prices applying to their own class was allowed in a small group of industries. The members of the asbestos industry voted, as the code prescribed that jobbers might inspect all jobber prices filed and that dealers might inspect all dealer prices filed, but that consumers should not be permitted inspection; this limited inspection was granted despite the plea of the largest member of the Industry that all price publicity should be deferred. Regional offices were set up in the mayonnaise industry for the express purpose of permitting "trade buyers and local manufacturers" to inspect filed prices, but the files were not open to actual consumers. The structural clay products industry made consumers prices available to the district representatives of the builders' supplies industry who were dealers in the industry products. The Macaroni Code provided that prices should be available to all trade buyers and specifically prohibited inspection by consumer buyers.

The only dissemination to customers effected by the Code Authority of the Agricultural Insecticide and Fungicide Industry was the weekly publication of "going quotations" which summarized the current filings in the Oil, Paint and Drug Reporter.

In almost one-fourth of the industries studied, the central agency disseminated no data to buyers, but the members themselves were required by the code to secure publicity for their price changes. Each member of the asphalt shingle and roofing industry was required to "publish" his prices to his trade, each buyer to receive the prices for his class only. The Business Furniture Code Authority refused to release in-

formation to customers, but the code required members to "publish" prices. Other industries in which the central agency made no information available to non-members but in which the code required members to "publish" prices were: carpet and rug, plumbing fixtures, salt producing, shovel, dragline and crane and valve and fittings. There is little evidence as to the nature or degree of compliance with this codal requirement. In three other industries, funeral supply, retail rubber tire and battery and marking devices, customers could not obtain data from the code authority but, operating under a codal requirement, great numbers of members "posted" their prices in conspicuous places and thus effected some publicity to buyers. Likewise, in the machine tool and forging industry, members were required to "announce" prices and in the cement industry to "broadcast" prices; compliance with this by members constituted the only price publicity available to customers.

In eight other industries there is positive evidence that the central agency released no filed data to buyers. In only one of these, the coffee Industry, did the code require that prices be available to purchasers; the secretary of the code authority stated in an interview, however, that customers made no effort to obtain information because news of price changes traveled so rapidly through salesmen and otherwise that dissemination by the agency was unnecessary. The codes of the other industries made no provision for availability to buyers. The National Electrical Manufacturing Association opposed publicity of prices to buyers at all times and its representatives asserted that price filing was not carried on for the benefit of buyers. The same attitude existed in the Farm Equipment Industry where even jobbers were refused information regarding jobbers' prices filed and in the gas appliances industry where it was resolved that jobbers and other distributors be denied information. The other four industries in which there was no dissemination of prices to buyers and no codal injunction upon members to publish prices were: canvas goods, ladder, steel castings and underwear.

In six industries where no provision was made for dissemination to buyers in the code, evidence is lacking as to whether or not the central agency went beyond the minimum requirements and actually released data to buyers. The absence of positive evidence that dissemination occurred taken in conjunction with the absence of a code provision for dissemination creates a presumption that information actually was not released. The six industries were: cast iron soil pipe, fire extinguishing appliance, lime, nottingham lace curtain, rubber manufacturing and vitrified clay sewer pipe.

Finally, in three industries, marble quarrying and finishing, medium and low priced jewelry, and wood cased lead pencil, practically no filing was made by members, so that dissemination to buyers was of course non-existent.

There is tabulated below the results of a questionnaire sent to former code authority officials for industries with price filing systems which were not included in the code sample. The replies are in

answer to the question of the extent to which customers availed themselves of the opportunity to inspect or request that prices be sent

Industry	Answer
Air filter	Very infrequent
Concrete mixer	Very little
Household ice refrigerator	Very few asked for them
Metal tank	No requests
Motor fire apparatus	No requests
Pulp & paper mill wire cloth	Practically none
Sheet metal distributors	None
Talc and soapstone	None
Transparent materials converting	Very little desire
Water meter manufacturing	None
Card clothing	No requests
*Industry C	Six Requests
*Industry A	One request
*Industry D	Very small extent
Cutlery, manicure implement, etc.	No requests
Cutting die	None
Perfume and cosmetics	Not more than 100 requests
Road machinery	Practically none

It is apparent from all of the evidence above that not a great deal of price publicity to buyers was achieved as a result of price filing in the industries studied. In an important share of the industries, publicity was deliberately denied to buyers, while in most of the remainder of the industries it was either limited as to scope or obstacles were placed in the way of obtaining adequate information. However, there is the fact that buyers frequently did not fully avail themselves of existing opportunities for obtaining information; this seems to be confirmed by the replies to the questionnaire as tabulated above. To some extent this seeming lack of interest was the result of difficulties in obtaining information - the need of going to the agency office in a distant city, the expense involved or other factors; but on the other hand it is explainable on the basis that necessary information was readily and customarily obtained through other channels.

It should be pointed out in conclusion in order to avoid any misapprehension upon the matter, that prior to the NRA, publicity to buyers had never been a feature of organized price publicity. Even Eddy's plan never included distribution to customers -- partly because some incentive was needed to get members to file and exclusive use of the data represented such an incentive. NRA, it may be said, did contribute and emphasize this idea.

(*) Requested to be kept confidential.

RECAPITULATION OF EVIDENCE BEARING ON NATURE AND EXTENT OF PUBLICITY PROVIDED BY PRICE FILING PLANS

A. Publicity to Members

Price filing, as it operated in the Selected sample of fifty-seven industries, by no means afforded complete publicity of pricing policies. The substantial deficiencies of the assembled information were accentuated by the fact that much of it never reached the hands of competing members. In a few cases, competitors were able, through price filing, to obtain substantial, complete knowledge of sellers' pricing policies. These were the exceptions. The average results fell far short of that mark.

There is presented below a recapitulation of the known factors in the industries studied which operated to detract from full price publicity to members. The information has been compiled from code requirements and from available records of actual performance, but in the absence of a systematic survey by questionnaire to check the extent of adherence to code requirements, the tabulation is subject to omission and other possible errors.

Agricultural Insecticide & Fungicide (100 members)

Filings on non-standard products incomplete
Only a few terms of sale filed
Minimum and not actual prices were filed
Members received filings only upon request but were notified by letter of new schedules filed.

Asbestos (50 members)

Some non-adherence to filed prices
Most competing distributors did not file prices
Prices to automobile manufacturers not disseminated regularly

Asphalt Shingle & Roofing (35 members)

Some non-adherence to filed prices

Baking (25,000 members)

Very few retailers filed and 60 percent of wholesalers did not file
At least half of those filing did not adhere
Lacked necessary ingredient standards to make filings comparable
Only inspection of files permitted and this confined to persons having "legitimate interest"
Only a few requests for inspection

Builders' Supplies (40,000 members)

Very few filings after first month of operation (because of code authority ruling that price filing not mandatory after Executive Order 6767)
Some non-adherence to those prices filed.

Members received filings only upon request and at 10 cents per page; in requesting required to designate filings or specific member

Business Furniture (150 members)

Small minority never filed and many eventually stopped filing (because of refusal of FTA to approve mandatory resale price maintenance)
Adherence gradually broke down until adherence requirement finally was stayed (breakdown caused by necessity of meeting distributors' prices)
Custom-built products excluded
Complaints from some members that prices were not sent to them

Candy Manufacturing (1000 members)

Two-fifths of membership never filed
Members received filings only upon request and payment of costs; required to designate filings of specific member; could get filings only for trade classes to which they sold
Only 162 requests in first three months and for prices of only 13 firms

Canvas Goods (15 wholesalers; 3,000 retailers)

Wholesalers never filed and very few retailers did
Very poor adherence on the part of those filing
Lacked workable product classification
Dissemination confined to inspection

Carbon Dioxide (40 members)

Twenty percent of members never filed (due partially to dislike of filing with trade association by non-members)
Competing distributors did not participate in latter part of price filing period
Sales in small containers to medical field excluded from filing by code authority
Dissemination only to competitors in same region

Carpet and Rug (50 members)

Some non-adherence to filed prices
Prices filed were minimum and not actual

Cast Iron Soil Pipe (35 members)

Considerable non-adherence to prices filed
Some products designated by code excluded from filing requirement by code authority (lack of standardization or because multiple-line producers were using them as free deals)

Dissemination to non-members of trade association often delayed and at first refused entirely

Cement (100 members)

Disseminated only to competitors in same region

Coffee (1,200 members)

Only the larger members filed at all regularly
At least 75 per cent not adhering in later period (code authority explains by failure of FTA to prosecute early violaters)
Dissemination only on request and few requests made

Copper & Brass Mill Products (50 members)

Competing distributors did not file though many were bound to adhere by contracts with manufacturers
Dissemination only upon request or by inspection

Cordage and Twine (25 members)

Adherence good for a time but gradually broke down until filing provisions deleted by amendment
Competing prisons and Phillipine producers didn't participate which let to breakdown
Products used for manufacture of carpets, rugs, and furniture excluded from filing by code authority

Crushed Stone, Sand, Gravel and Slag (4,500 members)

Some non-adherence
A few products excluded from filing by code authority
Dissemination only to competitors in some region

Electrical Manufacturing (1,400 members)

Filing established only for part of industry products
Only three or four terms of sale included
Diversity of products and lack of standardization impaired comparability of filings
Prices filed were minimum and not actual
Disseminated only to producers of similar products and not all filings sent out

Envelope (175 members)

Many adopted schedules of others
Poor adherence to filed prices
Only lowest filed price and most favorable terms disseminated
Prices filed were minimum and not actual
Names of members adopting lowest filed price not disseminated

Farm Equipment (200 members)

Some non-adherence
Not all of competing distributors participated
Lumber manufacturers producing industry products did not participate
Prices filed were minimum and not actual
Inspection of filed data at Institute Office the only dissemination, though weekly bulletin listed members reporting changes and products involved

Fertilizer (800 members)

Some non-adherence
Filings on special formulae caused difficulties of comparison with standard preparations
Prices to wholesale cooperatives not filed

Fire Extinguishing Appliance (30 members)

Some non-adherence
Competing distributors didn't participate
Prices filed were minimum and not actual

Floor and Wall Clay Tile (50 members)

Some evasion through selling first grade products as "seconds"
Competing distributors didn't participate
Producers of similar products in Structural Clay Products and Terra Cotta industries didn't participate
Prices filed were minimum and not actual
Files data open to inspection only

Folding Paper Box (300 members)

Number of members didn't file
Considerable non-adherence
Very little filing on non-competitive products; only on those for which some member chose to register
Little similarity of products since most of industry products made-to-order
Prices filed were minimum and not actual
Sent only to producers of similar product who were "registered" for such products or for specific customers

Funeral Supply (10,000 members)

Number of members did not file
Some non-adherence
Prices filed were minimum and not actual
Sent out only prices on staple and highly competitive items: rest on request and payment of cost
Sent only to producers of same region and of similar products

Gas Appliances (1,300 members)

Half of members did not file
Much evasion of filed prices through indirect concessions such as free deliveries, crating and carton allowances.
Many terms omitted in filing despite instructions of code authority
Prices filed were minimum and not actual
Dissemination on most products only on request

Industrial Alcohol (15 members)

Meaninglessly low minimum prices filed by some
Number of smaller producers did not file

Macaroni (350 members)

Some members did not file
Considerable non-adherence to filed prices
Widespread evasion through giving of valuable premiums, open-end contracts and diversion of brokerage to trade buyers
Members notified of changes but could get details only on request and were required to specify individual filer, product, and grade when requesting data.
Number of requests received overtaxes agency's facilities

Machine Tool & Forging (225 members)

Non-standard products not included and definition of standard products ambiguous
Sent only to producers of similar products

Marble Quarrying and Finishing (200 members)

No filings made

Marking Devices (1,100 members)

One-third of members did not file
Very little adherence to filed prices
Non-standard products excluded
No terms of sale filed
No dissemination of information in any way

Mayonnaise (375 members)

Widespread non-adherence to filed prices
Competing distributors did not participate
Few terms of sale filed despite instructions
Details not disseminated, only summarizing letter; local price changes only available for inspection at regional offices

Medium and Low Priced Jewelry (650 members)

No filings were made

Metal Window (25 members)

Producers of similar products in All Metal Insect Screen Industry did not participate
Non-ferrous windows excluded from filing
Prices filed were minimum and not actual
No revisions filed to meet first revision of discounts were disseminated

Paper and Pulp (425 members)

Lack of product standardization impaired comparability of filings in some product divisions
Dissemination chiefly on request and few requests made
Prices filed were minimum and not actual

Paper Distributing (1700 members)

Many members did not file
Many adopted schedules of others
Widespread non-adherence to filed prices
Competing wholesale grocers did not participate
Absence of product classification impaired comparability of filings
Prices filed were minimum and not actual
Only lowest filed price and "representative medium" price disseminated
Names of members adopting lowest filed price not disseminated

Plumbing Fixtures (250 members)

Non-adherence was widespread (due to competition of wholesalers and provision permitting sales below filed price to meet competition; most common in Brass Group; eventually broke down completely)
Competing distributors did not participate
Members refused to file prices to mail order houses
Special discounts not disseminated

Ready Mixed Concrete (350 members)

Filings made only in several metropolitan areas

Retail Monument (2100 members)

Forty percent of the members never filed
Adherence by those who filed poor
Diversity of products retarded filing and impaired value of filings made

Many filings omitted terms of sale (small members hadn't formed consistent policy with respect to many terms)
Prices filed were minimum and not actual
No dissemination unless requested and cost of copying paid
Low prices not always disseminated
Dissemination only to members of same region

Retail Rubber Tire & Battery (140,000 members)

Filings largely confined to metropolitan areas
Adherence to filed prices was poor
No evidence of dissemination

Rubber Manufacturing-Auto Fabrics division (60 members)

Competing distributors did not participate

Rubber Manufacturing-Footwear division (15 members)

Rubber Manufacturing-Heel & Sole division (60 members)

Small members refused to file (asserted they would lose differential to better known brands and be wiped out)
Non-standard products excluded
Lacked quality standards
Adherence was poor

Salt Producing (50 members)

No dissemination of filed date except for a few special requests

Scientific Apparatus (450 members)

Some non-adherence
Producers of similar and substitute products in other industries did not participate
Lack of product classification and diversity of products impaired comparability of filings made
No dissemination except upon request and payment of five cents per page; in making requests members required to designate specific manufacturer and specific product

Set Up Paper Box (1000 members)

Very few members filed (due to failure of NRA to approve mandatory cost accounting manual)
No dissemination except upon request

Shovel, Dragline and Crane (35 members)

Almost one-third of members did not file
Some non-adherence by those who filed
Some members failed to file on non-standard products
Largest products excluded by code authority
Filing hampered by lack of workable product classification; some members refused to cooperate in classification

Some of filings omitted all terms of sale
Prices filed were minimum and not actual
Dissemination withheld from those not using uniform form, which was not sanctioned by code

Steel Castings (200 members)

Some non-adherence

Structural Clay Products (400 members)

Large number of members did not file
Adherence poor on part of those filing
Producers of similar products in floor & wall clay tile and terra cotta industries did not participate
Lacked workable product classification
Lack of delivered basis and zoning plan impaired comparability of filings (due to high shipping costs per unit and impracticability of filing prices for hundreds of destinations)
Dissemination confined to inspection

Tag Manufacturing (50 members)

Many adopted schedules of others
Only price elements were filed
Only lowest filed price disseminated and only to producers of similar products
Prices filed were minimum and not actual
Names of members who adopted lowest filed price not disseminated

Underwear and Allied Products (400 members)

Circular Knitters did not file (possibly because of dislike of filing with trade association)
No dissemination except upon request and where adequate reason was given; no specific prices ever given out, but only the information as to whether a filed price was above or below the price suggested by the inquirer.

Valve and Fittings (250 members)

One-half of membership did not file
Some non-adherence and evasion through indirect concessions
Competing distributors did not participate
Products of special design excluded from filing
Conditional or qualified filings prevalent
Prices filed were minimum and not actual
No dissemination of details but only a bulletin notifying members of changes

Vitrified Clay Sewer Pipe (100 members)

Competing distributors did not participate

Septic tanks excluded from filing by code authority, and filings on culls were refused
Many filings omitted terms of sale or were quite incomplete
No details disseminated, but only condensed analysis prepared by code authority
Dissemination confined to members of same region

Wholesale Confectionary (12,000 members)

About one-fourth of straight-line wholesalers did not file
About one-half of allied-line wholesalers did not file
Non-adherence was widespread
No dissemination except upon request and payment of 10 cents per page; bulletin from code authority notified changes as made

Wood cased Lead Pencil (15 members)

Practically no filings received (because of failure of NRA to approve supplementary control provisions and refusal of members to file special discounts to preferential customers)

It may be seen from the above summary that in more than half of the industries studies the price filing system failed to make available to the members of the industry any appreciable knowledge of competitors' prices. In at least six industries there was no publicity at all and in perhaps ten more the publicity achieved was quite insignificant. In not more than a dozen of the industries could price publicity be described as substantially complete. It appears then that in these fifty seven industries the publicity function of price filing was comparatively unsuccessful.

The above summary indicates some of the many factors which in combination accounted for the ineffectiveness of price filing in achieving publicity of prices. The chief of these may be summarized as follows:

One general factor was the failure of a number of the members of various industries to file any information at all. A number of reasons may account for this. It was found that in industries with a relatively large number of units, many of which were small in size, the filing of information was particularly incomplete. The lack of success in the baking, builders supplies, canvas goods, marking devices, paper distributing, retail monument, retail rubber tire and battery, and wholesale confectionary industries illustrates this point. It was often found difficult to induce proprietors of very small businesses to participate, even in industries with a smaller membership. Their markets were chiefly local, their pricing policies often not always sufficiently explicit to report them indetail or to undertake to adhere to them.

The poor response to the requirement to file was

frequently attributed by industry members to NRA's failure effectively to prosecute the few early violators. This encouraged others, some of whom were tempted by the advantages of secret price cutting whereas others were confronted with the necessity of meeting the competition of earlier violators. In other instances apprehension about the use that was made by the central filing agency of the filed information explained refusals to file. In some cases members found the expense and effort involved in preparing information for filing too burdensome. Many members refuse to participate in any of the cooperative programs because they disapproved, for reasons not always expressed, either of the principle of NRA or of price filing. The aggressiveness of the code authorities in urging members to file influenced greatly the degree of compliance obtained. Failure of the code authority to induce members to file may have been due either to the code authority's inefficiency or its lack of interest, insufficient funds to enforce the filing requirement, or the failure of the NRA Administrator to support its compliance activities. The code authorities and industry members lost their enthusiasm and interest for price filing in certain industries when NRA refused to approve various supplementary control provisions; this is exemplified by the wood cased lead pencil and set up paper box industries.

Failure of members to adhere to their filed prices was a second general factor which frequently detracted from the publicity achieved. To a considerable extent the factors presented above as explaining the failure to file prices explain also the failure to adhere to prices once filed. In addition it may be stated that members who had filed prices were in some instances impelled to abandon adherence in order to meet the competition of enterprises not coming within the jurisdiction of the code. This was most often the situation in industries where some members distributing their own products directly to the consumer faced the competition of intermediate distributors employed by other members.

The third general factor defeating publicity was the failure of central agencies to provide full dissemination of the information received. It was not possible in most cases to ascertain the reasons for non-performance by the agencies; on the basis of available evidence, however, these explanations are suggested: The clerical cumbersomeness due, in some industries, to the large number of members filing prices, and in others to the volume of filings received from each member, interfered with the complete dissemination of the price information received. In some cases, the expense involved in full dissemination would have far exceeded the funds at the disposal of the agency. Finally, some code authorities simply were not interested in price publicity and accordingly made no real effort for adequate dissemination.

Part of the poor record of publicity is directly at-

tributable to the failure of members to seek the information. This applied in industries whose codes provided for the inspection of price lists at central points and those which provided that the information would be sent only when requested by members. Failure to take advantage of the information was in some cases due to the expense involved in either paying for sheets to be mailed or sending someone to obtain the information. In some instances it appears that the lack of interest was explained by the fact that members either had already obtained the information through other channels or could do so more easily than through the price filing device.

In addition to the above, there were several reasons why in certain of the industries effective publicity was not obtained. The filing of terms of sale, which frequently constituted significant variables in real prices, was in some cases excluded by code authorities; in other cases efforts to include all of the significant terms of sale met with failure. In a number of industries minimum rather than actual prices were filed. It was usual to exclude from the scope of price filing some products -- particularly non-standardized made-to-order ones. Where non-standard products were listed the lack of comparability often made existing filings without value. Prices to certain types of buyers were occasionally omitted and the classes of customers were frequently not well defined. The geographical scope of the plan often was limited. When freight was an important item of cost, comparability of prices was impaired when filings were on an f. o. b. basis.

B. Publicity to Buyers

The publicity afforded to buyers by price filing in the industries studied was even less than that realized by industry members. The deficiencies of the information assembled has been summarized in the preceding section. The smaller amount of publicity realized by buyers was the result of the more limited dissemination of information to them. To some extent this was due to the fact that the codes made no provision for publicity to customers. In other cases the industry agencies made no effort to perform in accordance with their responsibility to distribute information to customers. Finally, it was often the case that although provision was made to customers by the industry agency for obtaining information through specific request or by inspection the customers either lacked interest or found it inconvenient or too costly to avail themselves of these opportunities.

Taking into account the limited amount of data collected and the limited degree of dissemination, the evidence indicates that in fully half of the industries studied little or no price publicity was afforded by the price filing plans to buyers; and in no more than ten of the remaining half of the industries was the publicity afforded of any substantial utility.

CHAPTER IV

PRICE FILING AS A CONTROL DEVICE

I. INTRODUCTION

All price filing is for the purpose of 'control' - if control is defined as influence over prices and pricing practices, and/or competitive relations. Price publicity in itself operates as a corrective or control measure by altering the atmosphere of business operations, i.e., by removing doubt and uncertainty, secrecy and ignorance in business dealings. Such a means of regulation is directed presumably toward "fair" competition for all, with no ulterior industry purpose to regulate the making of prices or the freedom of individual producers to alter their prices at will.

Mr. Eddy offered price filing to business men as a legal method of attaining control - a method that depended upon the natural prophylactic effects of publicity, rather than on the artificial price-fixing agreements which were both illegal and ineffective. In advocating the open price policy, he devoted some large amount of time and space to its ethical values, "the new competition which is to eliminate 'vicious' bidding, secret rebates, concessions and graft, to end fraud and misrepresentations and the lying buyer who claims to have a lower bid when he has not, and 'to make business life a little better worth living'."

There is no reason to doubt the sincerity of this economic philosophy as propounded by Mr. Eddy; but neither is there any reason to minimize the practical considerations that accompanied his advice. The existence of the anti-trust laws was in a large part responsible for the guiding principles set up by Mr. Eddy in recommending this type of cooperative activity as a remedy for disturbing price competition. His admonitions were to avoid mandatory actions, to avoid collusive agreements, and even the appearance of evil, by disseminating price lists widely, with no suggestions as to their meaning or as to their desirable or undesirable characteristics. In other words, members of industry were to be <u>led</u> into cooperative exchange of price lists and were to be led only as far as the light on the legal horizon guided the way. In his own words:

> "The theoretical proposition at the basis of the open price policy is that knowledge regarding bids and prices made is all that is necessary to keep prices at relatively stable and normal levels. No agreements to maintain prices are necessary; they are not only unnecessary but detrimental." (*)

Publicity was advocated by Eddy as a cardinal principle - as a measure of protection from the anti-trust laws as well as a means of building cooperation and confidence of participants in the plan. It was to demonstrate to a suspicious public that price filing was not akin to price fixing and utilized no controls other than that of publicity itself.

(*) Federal Trade Commission Report, <u>Open Price Trade Associations</u>, page 6, paragraph 2.

"All that is done must be done openly. In order to avoid misunderstandings by members, by customers, by the public, it is necessary that the constitution and by-laws be carefully drawn so as to express in full the purposes of the association and every agreement underlying its organization. This is advisable everywhere. It is doubly advisable in this country where the law regarding restraint of trade is so strict and the public so suspicious. Both the safety and strength of the association lie in publicity. This means that, once organized, the records of all meetings, all transactions, must be so kept that they set forth accurately every act of the association that has any bearing upon prices, conditions of trade and the objects of the organization--Hold meetings with open doors - literally, not figuratively; invite competitors to attend as visitors whether they wish to join or not; and urge any curious or doubting customer to come and observe what is done. Do nothing you are afraid to record; record everything you do, and keep your records where any public official in the performance of his duties may have easy access to them. In short, preserve so carefully all evidence regarding intentions, acts and results that there will be no room for inference or argument that anything else was intended, done, or achieved." (*)

The possibilities of open price filing for controlling prices, or at least for encouraging more uniform and profitable price levels, and for use in securing compliance with price control measures such as allocation of production, basing points, etc., had appeared in some detail in the Supreme Court Cases, but the use of price filing to these ends was limited by the pervading restrictions established against cooperative measures in restraint of trade, and the inability to compel all members to participate in price filing or any other program of control. The fact that NIRA provided for some relaxation of the anti-trust laws made it less necessary to proceed with the caution advocated by Mr. Eddy, and less necessary to depend upon voluntary cooperation.

The NRA codes offered the opportunity to make participation in price filing and adherence to published prices mandatory, through the legal penalties of code violation. Even so, code proponents were obviously reluctant to depend upon publicity alone to stimulate the initiative and judgment of separate producers in the direction of more stable and more profitable prices. It was recognized that publicity was not a sure remedy against the disruptive practices of ignorant or recalcitrant members, nor was it a protection against such independent members as might find their individual interest not in accord with the general group program of stabilization. For these reasons, price filing was bolstered with other prohibitory code provisions; - prohibition against selling below cost, various restrictions on terms and conditions of sale, resale price maintenance, and other forms of distributor controls were common. In other words, because members might not automatically be enlightened to act in their own (or the groups) best interest by the fuller knowledge given through publicity, certain barriers to their freedom of action were incorporated with the publicity requirement.

As it became increasingly hard to secure administrative approval for formal code controls, more and more reliance was placed on the price filing

(*) I bid, page 8, paragraph 4.

device to achieve the same or similar results. In addition to serving as a check of compliance with accessory code controls, it became a ground for various limitations on merchandising and price practices." (*)

These requirements ordinarily involved restraints on the individual member in the determination of what prices and terms he could or must publish in the first place, his freedom to depart from or change those prices or terms once they had been filed, and his right to apply them to such customers or localities as he chose.

Perhaps the best reason for exploring the control aspects of price filing in relation to other code provisions is that "going" open price plans offered the most obvious opportunities for extending other measures of control. If these were sanctioned by the code, this extension was essentially legal even if no sufficient account had been taken of the cumulative economic effects of such measures in the industry concerned. If these other controls were not granted in the code, they could in many instances be introduced extra-legally in the form of rules and regulations (governing the manner of quotations, the essential elements of acceptable filings, etc.) or by concerted action to follow certain group practices. Price filing obviated one of the weakest factors of such concerted action as voluntary agreement for price control. Once agreement had been reached, price filing publicized the first deviations therefrom and, because of the requirement to adhere to prices on file, afforded legal recourse against any member that was inclined to weaken or to make an exception in the case of a particularly desirable order. Hence only open departures from such agreements, properly filed, were immune from legal penalties.

The rules and regulations pursuant to price filing requirements often had the trappings of authority if not the official seal. This was a significant element in price control during early months of code operations although of decreasing importance as a deterrent in later months. Vague or general powers to administer the price filing plans, or the assumption of such powers in apparent good faith, offered a real protection to those code authorities that wanted to regulate prices or pricing methods. So long as the rules were pseudo-administrative in character, those issuing them entailed no real risk beyond official disapproval and possible rebuke from NRA officials supervising the operation of the plans. Even this risk was minimized by the absence of continous supervision and the existence in other codes of provisions sanctioning the same type of control activity.

(*) See above for a discussion of the two control functions of price filing: That of policing other code restrictions or regulations of price; and of serving as a means for imposing various price controls - either through their incorporation in the original code provision or by the industry agency administering the plan. As pointed out there, this distinction, while necessary from an analytical standpoint to distinguish clearly the control from the publicity function of price filing, has not been formally used in the organization of the evidence presented inthis chapter.

The very real difficulties encountered in the operation of price filing plans within the code limitations could often be cited to demonstrate the need for additional legal controls to ensure the beneficial publicity values of price filing. Industries might thereby gain a sympathetic hearing and sanction from NRA for additional powers to that end. The significance here is that measures facilitating the publicity function of price filing, i.e., classification of products customer classification, price filing by distributors, uniform terms and methods of quotation, are commonly the same measures that facilitate the control function of price filing, or overt price fixing by collusion. In an administrative regime highly dependent on blanket policy rulings, with only intermittent supervisory contacts, the matter of intent and consequent effects could not be determined with any high degree of certainty or promptness. If the industry or code authority was reasonably discreet in behavior, cooperative action in price control was relatively easy to conceal under the guise of price filing.

It is part of the function of this chapter to explore the activities that were initiated and carried out in the name of price filing, not for the purpose of allotting responsibility for the developments, but to present some perspective of the ramifications of the device as a regulatory measure and, if possible, to indicate also, which of the developments are non-essential to the publicity device and hence avoidable under a better administrative regime, and which are more basically related to the publicity device and must be allowed for and anticipated in the use of price filing as a cooperative device.

II. THE PATTERN OF CONTROL ESTABLISHED BY THE CODES

The forms of control in which price filing plans played important roles appear in at least five major groups:

(1) Control over the price level

(2) Control over price changes

(3) Control over the price structure

(4) Control over channels of trade and distributors

(5) Control over division of the business

Only the more salient aspects of these inter-relations can be dealt with here. Other studies in the trade practice field will develop in more detail the functional aspects of various measures other than price filing in promoting these ends. It is the intention here only to describe the nature of the use to which price filing, as one of the several measures, was put in bringing about an attainment of these objectives.

A. Control Over the Price Level - Relation of Price Filing To Cost Provisions

1. Introduction

The general expectation that price publicity would serve as a

deterrent to destructive price cutting was noted in Chapter III. But few industries were content to rely on this more indirect and uncertain means to a more favorable price level. There was a demand for the immediate elimination of sales below cost--a demand which had been anticipated and tacitly approved in the Congressional debates preceding the enactment of the National Industrial Recovery Act. (*)

In the absence of out-and-out price fixing by the establishment of minimum prices, the most obvious prop for the price level was some kind of cost floor below which members were not allowed to quote. The existence in a code of such a cost floor, and its observance by members, would introduce some deterrent to price cutting and some control of the price level whether open price filing was present or not. Hence, if there is to be obtained any realistic appraisal of the role of price filing in the control of the price level, the prevalence in open price codes of various types of no-selling-below-cost and other minimum price provisions cannot be ignored. The following discussion will be confined in most part to the relation of price filing to selling-below-cost provisions, since these latter provisions represented the principal type of regulation designed to exercise a direct control over the price level.

The close relationship between cost comparison work and price filing had been noted by the Federal Trade Commission in its report of 1929. (**) The general observation was made that the two were similar in nature in that both had for their objectives an improvement in general market information which would lead to more intelligent pricing practices. Educational cost work had been frequently utilized by open price associations; but the essential duplication of effort and expense involved in organized cost comparison and price reporting led the Federal Trade Commission examiners to the conclusion that these two activities were apt to be alternative rather than joint methods of cooperation, with cost comparisons more commonly used in industries whose products were not sufficiently standardized or comparable to make price comparison easy. (***) The fact that complete cost figures (based on uniform cost formulas including all indirect as well as direct costs) might serve as suggested prices and be used for concerted price control quite as easily as might price reporting was recognized by the commission's report, but the elimination of ignorance concerning costs was generally considered a sufficient motive and justification for such activities.

The cost provisions in NRA Codes, however, were not designed solely for use in the elimination of ignorance. Like the price filing pro-

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(*) Congressional Record, 73rd Congress, First Session, 5373. Cf. page 32 ff. Nelson, Saul, Minimum Price Regulations Under Codes of Fair Competition (February, 1936)

(**) Op. city., Chapter IV, page 161 ff.

(***) Separate cost elements rather than prices were filed under a number of NRA price filing plans. These ordinarily were industries having non-standarized or made-to-order products, or were competitive bidding, based on cost estimates, was the usual method of price quotation.

visions they contemplated a mandatory restraint on members not ready to act in accordance with the knowledge of their own or others' costs. There is no indication that cost methods and price reporting were regarded as substitute provisions in the drafting of codes of fair competition. There was never any apparent inclination to discourage their simultaneous use in codes. A "no selling below cost" provision, together with authorization for uniform accounting methods to be developed and approved by the Administration, was a most frequent accompaniment of a price filing provision. Minimum price and cost provisions appear more frequently in early price filing codes than in codes without price filing provisions. As is illustrated by the following statements, the combination of "no selling below cost" and price filing provisions was regarded generally as the ordinary and basic element of code control against "destructive" price cutting and price instability.

In a report submitted to the Code Authority for the Retail Monument Industry by Mr. Donald Blake, on March 26, 1935, when he submitted his resignation as chairman and as a member of that code authority, he stated:

> "....when we attempted to 'reprimand' some of our members for selling below cost.....we were advised that 'cost' was such an indeterminate and vague term the provision could not and would not be enforced unless and until a 'yardstick' of costs or a cost finding system had been adopted and approved by the Administration. Months of effort and hundreds of dollars have been expended in a futile effort to secure 'the bureaus' approval of a 'yardstick' or cost system - although the provisions of our original code definitely stated that it was one of the 'duties' of the Code Authority to prepare and adopt such a system. The failure of the 'selling below cost' provision and the refusal of the NRA to approve a cost system have vitiated and voided the purpose and effect of the price filing system. Thus, today, so far as price stabilization is concerned, we find ourselves in precisely the same deplorable position we were in prior to the Code."(*)

The Administration member of the code authority for the marking device industry, Mr. F. D Hansen, in a letter to Mr. J. R. Swift, the chairman of the code authority for that industry, on September 7, 1934, discussed the question of the price level in the industry and the relation of the cost formula and price filing to changes in that price level. After reminding Mr. Swift that administrative approval was necessary for the cost formula, Mr. Hansen, referring to a letter he had previously received from Mr. Swift said:

> "....The filing of prices.....can, of course, be called for by the Code Authority at any time, but until the cost finding system is established, apparently this will not help matters, and I quite agree with you in this opinion....." (**)

Clearly both Mr. Hansen and Mr. Swift regarded price filing as an adjunct of cost finding systems, designed for and useful for enforcing cost formulae.

(*) Report in NRA Files, Retail Monument Code. (Underlining supplied)

(**) Letter in NRA Files, marking devices industry.

At the hearing on the code for the paper and pulp industry a statement made by one of the chief proponents of the code similarly stressed the importance of the price control which the industry expected to achieve by virtue of the combination of price filing and "no selling below cost" provisions. Mr. S. L. Willson, President of the American Paper and Pulp Association stated at this hearing:

> ".....To facilitate the rehabilitation of the Industry to a point where it may pay its proper dividends to the thousands dependent upon such incomes for livelihood and to protect the level of wages herein provided, the Code contains provisions for open price records and restraining provisions against selling below cost. It provides for the necessary protection of its competition from the relative few who, with or without reason, have in the past initiated unfair price cutting...." (*)

The structural clay products industry attempted to link price filing, and minimum price fixing. At the hearing on this code held on August 23, 1933, it was proposed by the code committee that the proposed code be revised to include the following:

> ".....The Regional Recovery Committee shall have power on its own initiative or on the complaint of any manufacturer to investigate any price for any product shown in any list filed by any manufacturer....If the...Committee after such investigation shall determine that such price is an unfair price...the Committee may require the said manufacturer...to file a new list showing a fair price...If such manufacturer shall have not, within ten days after notice....filed a new list showing such fair price...the said Committee shall have power to fix a fair price for such product, which fair price, however, shall not be more than the price of any other manufacturer at that time effective for such product...The deplorable condition of this Industry requires this revision and it is included with the understanding that it is subject to review by the Administrator after a nine months period...." (**)

The code authority for the macaroni industry even attempted to use price filing to make certain actions of industry members code violations retroactively. The code for this industry contained a rather ambiguous provision which permitted members of industry to sell below individual cost to meet "...the price of a competitor which is not in violation of this code." (***) The code authority, amplifying this provision advised members of the industry as follows:

(*) Transcript of the Public Hearing on the code for the paper and pulp industry, September 14, 1933, page 25-26. (In NRA files. Paper & Pulp Code.)

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(**) Transcript of the Public Hearing on the Code for the Structural clay products industry, August 23, 1933, pages 249-251.(In NRA files.)

(***) See Article VII, Section 5 of the code for Macaroni Industry, Codes of Fair Competition, as approved, Government Printing Office, Volume V, page 534.

"Pending investigation of price lists which appear below cost, we will hold that....any member who meets a price which is under investigation will also be put under investigation. If the price being investigated, later proves to be in violation of the Code, the member meeting such a price will also be alleged to be in violation of the Code. This is a drastic ruling, but is absolutely necessary to clean up the chaotic condition now existing. We hope you will see the necessity for this....." (*)

The original code provision made it virtually impossible for a member safely to meet a lower price since it would be impossible to ascertain definitely if that price were in violation of the code. The code authority ruling would either have forced higher prices or made a large number of industry members liable for code violation retroactively. (**)

The importance of the combination of cost and price filing provisions can not be measured solely by the frequency with which it occurs, but involves also the functional relationship as established by the various codes.

2. Prevalence of Cost and Minimum Price Provisions in Codes in the Study Sample

The most common form of cost limitations were those prohibiting sales below cost. Such provisions appeared in 47 of the 57 codes in the sample. With the exception of the Farm Equipment Code, all of the forty-seven codes prohibiting selling below cost provided also for the establishment of uniform cost accounting systems as a basis for determining cost. Only eleven of these cost methods received NRA approval; in five instances the approval was conditional. (***)

(*) Bulletin No. 27, August 20, 1934, issued by Macaroni Industry Code Authority, In NRA Files, macaroni industry.

(**) Other evidence of the use of price filing to effect price control are given below in Chapter VI, While these instances do not always indicate an explicitly stated desire to use price filing systems for price control objectives, they do indicate the actual use of such systems in that manner and are, therefore, perhaps of even more significance than mere statement of intent.

(***)

No. of Code	Name of Code	Date approved	Administrative Order No.
67	Fertilizer Industry	2/24/34	67-4
234	Macaroni	3/31/34	234-4
265	Coffee	3/31/34	265-4
128	Cement	5/12/34	128-9
333	Canvas Goods	5/ 5/34	333-5
134	Gas Appliance & App.	6/ 7/34	134-9
98	Fire Extinguishing Appliance	7/20/34	98-5
176	Paper Distributing Trade	9-19-34	176-21
156	Rubber Manufacturing	9/25/34	156-37
204	Plumbing Fixtures	9/14/34	204-14
37	Builder's Supply Trade	12/3/34	37-23

Thus the Standard Principles of Accounting for Determination of Costs for the Gas Appliances and Apparatus Industry were sanctioned, with the proviso that if within a period of four months it was determined that inequities were created by the use of such principles, the approval would be rescinded. The plumbing fixtures industry received approval for their cost accounting system on condition that the code authority endeavor to improve the system and report to the administrator within six months. The administrator's order of approval of the Elements of Cost for the Macaroni Industry limited the effective periodto 90 days. The terms of the order approving the Uniform Accounting Manual for the Rubber Manufacturing Industry specified that the divisional code provisions prohibiting sales below representative costs were to be deleted, that the method of calculating the cost of certain items be revised, and that the code authority report the results of the use of such manual to the division administrator within 90 days. The approval of the Uniform Accounting Items for the Builders' Supplies Trade indicated that each member of the trade should utilize such methods "to the extent found practicable."

Prohibitions of destructive price cutting, either general in form or in accordance with Office Memorandum 228, which permits complaint and final NRA determination as to the destructive nature of the prices, appeared in nine of the fifty-seven codes.(*)

Provisions permitting the declaration of an emergency, and the determination of minimum prices to apply during such emergency, were contained in eleven of the fifty-seven codes. The Copper Code, Canvas Goods Code, the Mayonnaise Code, Baking Code, Candy Manufacturing Code, Wholesale Confectionery Code and the Agricultural Insecticide Code, contained provisions similar to that set forth in the Office Memorandum of February 5, 1934, which granted to the code authority the right to determine the existence of an emergency and, subject to NRA approval, to establish minimum prices based on lowest reasonable cost. The Lime Industry Code, Cast Iron Soil Pipe Code, Builders' Supplies Trade Code, and Retail Tire and Battery Trade Code, contained provisions similar to that set forth in Office Memorandum No. 228. In these provisions the NRA reserved to itself the power to declare an emergency and to establish the minimum price. Price emergencies declared on the basis of these provisions resulted in the establishment of minimum prices in three of the above codes for the periods indicated:

	Period	Admin. Order No.
Agricultural insecticide & fungicide	11/11/34 to 2/9/35	275 A-11
Cast iron soil pipe	7/16/34 to 10/13/34	18-8
Retail tire and battery	5/14/34 to 10/1/34	410-3 & 410-15

The candy manufacturing industry asked for an emergency declaration on certain products on two different occasions, but the NRA denied the application. The mayonnaise industry code authority also requested an emergency price declaration, but just previous to the date set by the

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(*) See copper, coffee, builders' supplies, cast iron soil pipe, mayonnaise industry, canvas goods, industrial alcohol, lime, carbon dioxide and retail tire & battery codes.

NRA for a hearing on this request the code authority withdrew its application, stating that the situation complained of had been adjusted. The hearing was accordingly postponed indefinitely.

Most of the codes exemplified by that of the metal window industry, simply provided that "no member of the industry shall sell any industry product at a price below his own individual cost", with an equally general provision that the code authority should provide for the formulation of a uniform cost accounting system to be used, after NRA approval, as a guide for determining such individual cost. Members were forbidden to sell below such costs and, of course, to file prices lower than such costs. Frequently, this limitation was modified to the extent that members were permitted to file below cost to meet a competitor's revised price that was not in violation of the cost provisions of the code.

Other cost provisions stipulated the factors that must be included in the cost calculations or cost formula to determine the individual minimum costs which must be covered by filed prices.

Thus the Asphalt Shingle and Roofing Code provided in Article XII that:

> "It shall constitute a violation of this code for any member of the industry to sell any product at a net price which shall be below the said member's 'direct cost'. Such 'direct cost' shall include the sum of the following items chargeable to the operation of such member's business in conformity with sound accounting practice, during the preceding calendar month.
>
> (A) Direct raw material cost (inclusive of transportation and shrinkage), plus
> (B) Direct labor cost, plus
> (C) Manufacturing burden (inclusive of power and steam, factory overhead, maintenance expense, technical control, factory warehouse, and factory shipping charges), plus
> (D) Fifteen (15) percent of the 'Total Manufactured Cost'; (i.e., the sum of the items 'A' plus 'B' plus 'D') provided that depreciation taxes, insurance, preserves of any character, interest on investment, selling and administrative expenses, and prior operating losses, likewise interest charges on funded or other debt shall not be included in 'Manufacturing Burden'; and provided, further, that any member of the Industry may sell below his own 'direct cost' under the following circumstances:
>
> "(a) to meet competition on prices established on products of competing grade and quality filed by another member of the Industry pursuant to Article VII hereof, and not directly or indirectly investigated by the party desiring to meet such competition, or
>
> "(b) to meet competition in violation of this rule concerning which he has made complaint to the Code

Authority, or any authorized agency thereof, but only pending action thereon." (Underlining supplied)

Lowest representative costs as a basis for determing the minimum price was provided for in the Code for the Fire Extinguishing Appliance Manufacturing Industry (Code No. 98). This method is described under (e) of Article VI:

> "The Code Authority shall proceed to establish a uniform system of cost accounting in conformity with accepted standards, for use by the members of the Industry. Upon approval by the Administrator, such system of cost accounting shall be used by each member of the Industry in determining his costs. Each member of the Industry shall report his individual costs, computed in accordance with said system, to a disinterested and impartial agency designated by the Code Authority. Such Agency shall determine the costs of that representative member of the Industry whose costs are lowest. Such representative costs shall be published to the Industry. No member of the Industry shall sell products of the Industry below such representative costs. Such representative costs shall be revised from time to time at reasonable intervals. The term 'representative member of the Industry' is defined as being one who manufactures within his own plant a representative line of the products of the Industry, who maintains research and development departments for improvement in the art of fire extinguishment, and who through educational publicity and sales promotion broadens the market and develops business for all members of the industry." (Underling supplied) (*)

The Structural Clay Products Industry Code (123) provided for the development of a uniform cost accounting system within 120 days after the effective date of the code, to be used in determining the individual cost of each member of the industry. In the interim, an "average cost" system was established in the following manner:

> "After a survey of the estimated cost, both direct and indirect, of the reasonably efficient plants then in operation within that region under the terms of this code, the regional committee may recommend to the Code Authority for its approval, subject to review by the Administrator, an allowable cost, provided that such allowable cost, shall not include any reserves for purposes other than depreciation, or any allowances for interest on invested capital or for developmental expenses, and provided further, that the distribution of indirect expenses per unit of product, shall be on the estimated basis of an average rate of utilization of plant facilities by such reasonably efficient plants during the period 1927-32. Upon approval by the Code Authority of any such allowable cost, no member of the Industry shall sell, or publish a price for any such product below its allowable cost so arrived at, except to absorb transportation charges to meet the published price of any other member of the industry for such

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(*) The application of this provision by the Code Authority beyond code powers is described in a subsequent section.

product." (*)

The Paper and Pulp Industry Code also provided for preliminary cost rules to be set up by the code authority pending submission and approval of a uniform cost system. These preliminary rules required no NRA approval and were in effective use during most of code period. The most important item in these rules required that raw materials be included in cost at current market price, whether purchased or produced. This effectively equalized the cost floor for integrated and non-integrated mills and acted as a bar to any drop in prices below the cost of the non-integrated mill.

3 - Code Provisions Conveying Power to Challenge and Void Prices

Examples of code provisions formally conveying to code authorities the right to apply tests of cost, and to void prices on the basis of findings, without the necessity of formal charges of code violation, will illustrate the functional relationship of such powers to price filing, and their potential influence over the level of prices as filed. It should be observed that in many instances the burden of proof was placed on the member whose price was challenged to show that his price was above cost, rather than on the code authority to prove that the price in question was below cost and in violation of the code.

Inasmuch as these powers were particularly restrictive of individual freedom in filing prices, additional examples have been cited from some codes outside the study sample.

The Iron and Steel Code, as approved on August 19, 1933, contained in Schedule E, Section 5, the right of the board of directors on its own initiative, or on complaint, to investigate any base price on file and to require the member to furnish cost data. If the base price was judged unfair for such product at such basing point and liable to result in unfair competition, the board of directors could require the member to withdraw it and file a new fair base price to become effective immediately. If such new price was not filed within ten days, the board of directors could set a price, not more than any other acceptable price on file for such a product at such a basing point. Notice of all decisions, together with the reasons therefor, were to be filed with the President. This provision was annulled in the amendment approved on May 30, 1934.

The Canvas Goods Code permitted an extension of the waiting period for an additional ten days to investigate a filed price. The Oil Burner Code provided further that if a price were found to be below cost, the list was to be withdrawn and a revised list submitted.

The Gas Cock Industry Code provided that where the Governing Committee found that any price would cause instability of the market, it might require a member to show that such price did not involve a net return less than cost, or it might require him to file a revised price.

(*) Article VI, Section (e), Code for Structural Clay Products Industry. Underlining supplied) Codes of Fair Competition, as approved, Government Printing Office, Volume Page

Such an alternative suggests the possibility that choice might well have been influenced by the degree of difficulty encountered or anticipated in convincing the code authority that a price was not below cost, or by the adequacy of a member's cost records to satisfy such an investigation. In this case the provision did contain the safeguard that the price was to remain in effect until shown to be below cost. The Gasoline Pump Code contained a similar provision.

Three similar codes for the compressed air, heat exchange and pump mfg. industries, which operated under the same supervisory agency, gave this agency the right to investigate any filed price, require cost data, and if the price was unfair, having regard to cost, to require the filing of a new price. If the new price was not filed in ten days, the agency could fix a fair price, but not more than any other unchallenged price then on file.

In the Cement Industry Code, approved November 27, 1933, Article IX, Section 5, provided that if the code authority had reasonable cause to believe that any price filed at its office was in violation of any provision of the code it might extend the effective date of such price for a period of not more than ten (10) days in order to investigate the member's costs.

The Precious Jewelry Producing Code, Schedule A. 6, provided that any filed price below the member's cost, as shown by his certified cost sheets, (available to code authority upon request), should be held in abeyance by the code authority pending submission of a revised price based upon the cost of each article.

The Rubber Footwear Division of the Rubber Manufacturing Code introduced a more positive dependence between filed prices and costs by a provision which limited revisions of prices to meet those of a competitor, to a period of thirty days after the filing of new annual prices. "Thereafter any changes in Schedules must be supported by cost date to warrant such changes, submitted to the Divisional Authority."

The Paper and Pulp Code added to a very elaborate price filing provision the power for the paper industry authority to investigate any filed price, require cost data and upon stated cause make void such price. Power to suspend the price pending such investigation was lodged with the administrator, but there was no specific provision for his review of the decision arrived at by the Code Authority.(*)

The envelope manufacturing, folding paper box, tag industry and some thirteen other paper codes incorporated the requirement that filed prices must be justified either by individual costs or by the schedule of a competitor who was not selling below cost. The provisions all read substantially as follows:

(*) There was, of course, elsewhere in the Code, the usual clause giving the administrator right to review code authority actions.

"All schedules to be justified as (a) not below own cost, or (b) not below lowest competitive filed price; if latter, the competitive schedule to be identified....Members may file to meet revisions, effective date, Schedule justified by another schedule as in (b) above, to become void upon revision upward or cancellation of justifying schedule....Code authority may investigate any filed price, require cost data, and if violation is found notify member and price thereupon becomes void."(*)

One obvious advantage to such an interlocking requirement is the isolation of the low cost filer. By linking all the low prices to his schedule there would be an automatic cancellation of the lower prices of all members who had used his schedule to justify their own, at any time he chose, or was persuaded, to raise his price to a higher one.

The paper distributing trade included similar requirements of cost justification, with the provision that after 25% of the members in number and dollar volume had filed, all other members were automatically bound by the lowest price on file unless individual filings (justified by costs) were filed. The presence in the Paper Distributing Code of a stop-loss provision, based on replacement costs plus a minimum labor mark-up, gave immediate meaning to this cost determination, particularly in the case of sales by wholesale grocers and others who were prone to cut prices below the accepted levels.

In anticipation of an approved standard accounting system, the Foundry Supply Code provided that each member should thereafter file with price lists a statement of whether the price was justified upon his own cost or on a previously filed competitive price. No price justified by the latter was to be less than the lowest justified price of the product previously filed and still in effect.

The Machine Knife and Allied Steel products Code gave the code authority the power to require any member to show that a price was not below cost, if they found that it would cause instability in the market.

Under the Upholstery Spring and Accessories Code, the code authority might require any member to submit data on cost of production of any product for which prices had been filed and might, to prove the accuracy thereof, examine so much of the member's books and records as necessary; notification was to be given all members if such data were required. If the code authority found that the filed price violated the code, such price was to become non-effective, and after notification from the code authority, the member was to file a new price list complying with the code. All such decisions of the code authority, together with reasons therefor, were to be filed with the administrator, subject to suspension and cancellation.

(*) "Cost provisions of approved Codes," Report No. 38 by Post Code Analysis Unit of Research and Planning Division (In NRA files)

4. Code Authority Application of Cost Provisions.

The functional relationship of cost provisions to filed prices was in many cases not set forth in detail in the code. Presumably, however, the delegation to code authorities of the right to administer and to secure compliance with the codes would include the implied right to prevent and check violations of the cost limitations as revealed by prices filed with them or other agency under the price filing provisions. Specific administrative powers to apply these cost restrictions by investigating books and by suspending or voiding filed prices were granted in relatively few codes, but experience would indicated that the presence or absence of these powers in the code was no measure of the actual powers exercised by code authorities in challenging, investigating, delaying and rejecting filed prices which were believed to be below cost or at least below the level the Code Authority had decided was acceptable.

The fact that such powers were approved by the Administration in a number of instances may have seemed sufficient precedent to permit similar powers in other industries, inasmuch as the date of code approval or other chance circumstance led to the inclusion of such powers in some codes and their omission in others. Some industries that did not ask such powers when the open price provision was written assumed them either as necessary adjuncts to code enforcement or as a convenient means for keeping prices in line with some predetermined level. Thus in the coffee industry the approved cost formula forbidding sales below the replacement cost of green coffee, to be published bi-weekly by the code authority, was extended to an arbitrary cost floor which was used in checking filed prices. In an endeavor to fix minimum prices to an extent beyond that allowed by the formula, the bi-weekly bulletins announcing the replacement prices of green coffee included also minimum mark-ups for roasting set by the code authority. Sales at lower prices than those suggested were to be considered prima ficie evidence of violation and any prices filed below the established figure were to be challenged as below cost. Revisions of filed prices to recognize increases in the published replacement costs could also be checked by this means.

Actually, the code authority did not attempt to secure general compliance with the price filing requirement but focussed attention only on the more significant competitive units (large national distributors, important local distributors, and those units reported to be cutting prices). In this manner price filing served as a check on compliance with an arbitrary cost floor set by the code authority. The knowledge that prices below the established floor would result in a complaint and cost investigation was in most cases sufficient to deter the filing of prices lower than the allowable costs set by the code authority. (*).

(*) Memorandum, dated 9/25/36 from M. D. Kossoris Chief of Minimum Price Unit, on "Interview with Secretary of Coffee Trade Association, Monday, September 23, 1935" (In NRA files Coffee Code).

The gas appliances and apparatus industry provided for a test of costs in Rule 9 - Approval of Prices, issued to the industry on December 9, 1935, Bulletin 5:

> "All prices as filed shall be subject to the approval of of the Gas Appliances Committee and the Committee shall be authorized to investigate the prices to determine if they will result in the customer paying for the goods received less than the cost to the seller.
>
> "Each employer in the industry shall furnish the Committee a certificate certifying that the prices as filed are not contrary to the provisions of Art. VIII of the Code and that they will not result in the customer paying for the goods received less than the cost to the seller. This certificate will be accepted by the Committee as the basis for its initial and temporary approval of the prices."

This ruling was ordered withdrawn by the N.R.A. at a meeting on January 8, 1935. (*).

The ultimate refusal of the Administration to approve mandatory cost accounting systems and cost formulas prepared in accordance with enabling code provisions tended to make cost limitations legally inoperative in the majority of open price codes, but did not entirely nullify their effects. Particularly during the early days of the codes, thy were in common use as propaganda for higher prices and not infrequently as coercive devices to prevent the filing of low prices, even under codes that did not convey to the code authority specific controls over costs.

The Code Authority of the Mayonnaise Industry issued repeated bulletins to members warning them that increasing costs should result in the filing of new and higher prices to avoid "engaging in destructive price cutting or selling below your full cost."

Release No. 27, dated November 19, 1934, was a specific "reminder", and in addition disseminated information on pending price changes. The release advised that Kraft and Best Foods Companies were increasing their prices effective November 20, mayonnaise prices on a dozen 8-ounce jars to $1.55 and on salad dressing to $1.35. It continued as follows:

> "To avoid selling below cost and engaging in destructive price cutting such firms as Holsum, Blue Seal, Standard Brands, and others, have filed new prices on private labelled, unadvertised brands of salad dressing as follows:
>
> | | |
> |---|---|
> | 8-ounce | $1.25 |
> | 16-ounce | 2.07 |
> | 32-ounce | 3.50 |
>
> All of which is subject to a discount of 2- per cent...." (**).

(*) See below page 245 for code provision.

(**) The waiting period in the Code was stayed in the Order of Approval.

A later release, No. 37, cites three cases in which prices which the code authority regarded as too low were associated with sub-standard salad dressing and mayonnaise. Since the standard requirements of the code are mandatory, this communication might also be deemed a warning that too low prices might lead to investigation and changes of code violation (*).

The following extracts from the Minutes of the Meeting of a Regional Committee of the Code Authority for the Retail Monument Industry further illustrates this point:

"The most important thing for the dealers around New York City is to know whether the prices of monumental work can be stabilized at a minimum figure below which no one can sell?

"The Memorial Associates, Inc., with a membership of sixty in good standing - after months of work on the part of certain members - agreed upon and adopted a price cost schedule, which each member was to file as an individual or firm.

"Many did just what they agreed to do. Some did and subsequently withdraw their prices and filed lower schedules. Others merely did not keep their word-just went ahead and filed lower schedules.

"Before adopting these prices it was agreed that it was absolutely essential to stabilize the price level, so that all work sold should at least bring in the overhead cost. About fourteen men got together, so-called leaders, and after much discussion, finally agreed upon what the average overhead is. The idea was not to exploit the public at all but to establish that minimum below which it would not be possible to get even an overhead cost. Members could sell at that or above as the situation called for. They all agreed that with this minimum it would be possible to get a fair price for a monument, so that the man quoting a fair price would not be made to look like a robber by some one putting in a ridiculously low price in competition.

"This has not worked out. Those who filed lower prices are consistently taking away business from those who kept their word. It is not possible to meet lower prices when one does not know when the low filer is quoting. Therefore, the chiseler has had all the advantage because he has been able to keep his volume and add to it, while the honest man's market is being taken away from him by these seekers after volume." (**).

Mr. Althauff went on to suggest that the quickest solution to the

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(*) The further use of suggested price floors in the Mayonnaise Industry is discussed on pages 285-287 below.

(**) Minutes, December 10, p. 4 (In NRA files) These remakrs were made by a Mr. Althauff who is not identified in the Minutes.

above situation would be for all dealers to withdraw their filed prices and file new ones to meet the lowest competition. He admitted that this would be ruinous to many members, but that it would teach the low filers a well needed lesson and that once their volume had fallen off they would be ready to listen to a reasonable plan for the stabilization of the industry. He indicated further that if the organization in New York did not take some such action he would do it on his own account, since he could no longer tolerate the conditions described or as he put it:

> "In the meantime we cannot be put in the position of losing the business, and getting the name that we are high priced people and have these people seeking business on the ground that I am a member of the Code Committee and can't cut my price down to meet theirs." (*).

In Region No. 39 the Retail Monument Code Authority for Region No. 3, voted an extention of 10 days' time after May 9th, 1934, during which members could comply with the price filing requirement. The chairman suggested that assistance should be offered the dealers by enclosing in the letter a copy of the cost price figures adopted by the Memorial Associates, Inc. The supervisor of Memorial Associates, Inc. was asked to explain the figures of his organization and to serve on a committee to prepare the statement suggested above.

On April 10 1935, a letter was sent to the regional field offices instructing them not to attempt to enforce cost limitations not based on approved cost accounting plans, but priort to that time charges of selling below cost were occasionally filed and adjusted by the Compliance Division on the basis of arbitrary assumption of cost control on the part of the code authority. (**). These complaints were, in some instances, filed by the code authority with the Government Contracts Division. Since certification of compliance was necessary before awards were made, prompt decision were necessary to ascertain the legitimacy of the bid, and were occasionally rendered without due regard for approved standards for cost determinations.

5. <u>The Filing of Costs and Use of Price Filing in Connection With Costs Lists and Cost Manuals</u>.

In many instances even more intimate relationships between price filing and costs were developed by the methods prescribed for operation of the open price plan. These plans usually involved the filing of cost elements or cost factors to be used in estimating prices on made-to-order goods. In other instances the filing of prices was linked to some <u>gross cost</u> list or uniform cost manual from which members could file discounts or deviations to indicate their individual selling prices.

These plans were variously conceived and introduced to industry practice, and were not always contemplated by the code itself. Three examples will illustrate.

(*) Ibid, p. 4.

(**) e. g. Set-Up Paper Box Industry.

a. The Malleable Iron Industry.

The Code for the Malleable Iron Industry makes no provision for a price filing plan. It does provide that the code authority, in accordance with an approved cost accounting system could determine periodically a schedule of fair and reasonable costs in the industry and that it should be a violation of the code for any member to sell products of the industry at prices below the aforesaid schedule.

After a long process of negotiation cost schedules were submitted, and were to be multiplied by a figure $2\frac{1}{2}$ times the fair average costs, to constitute list costs from which a discount would be figured to arrive at the fair and reasonable cost. The purpose of this weighted schedule was stated to be to remove the circulated cost figures sufficiently far from the actual cost level to deter the tendency to regard them as suggested prices at which products were to be sold. The initial discounts broadcast to the industry by the code authority were to be those which would result in costs based on the fair and reasonable cost determination and might be expected to be used as a minimum price level.

To mitigate the price fixing element of this process a procedure was approved by which members could sell below these costs by filing all quotations made below these figures with full identification of the transaction including the name of the customer. The individual member was obliged, whenever question was raised, to establish the fact that his quotation was above his individual cost. By this process a virtual price filing system was set up, under which members abided by the fixed price level (not cost). A member could sell below such schedule only by filing with the code authority the customer's name and pattern number with respect to such sale, and being prepared to prove that it was above his own cost.

With various modifications and details, this method was in use from April, 1934, to the termination of the Act. The deputy administrator and others criticized the plan on a number of occasions because it required identification of the customer for all quotations below the fixed level. A memorandum from J. R. L. Santos, Assistant Deputy, on November 12, 1934, stated further that "the trouble involved in estimating and filing has tended to make the majority of orders in the industry based not on the individual member's cost, but on the schedule of Fair and Reasonable Costs formulated by the Code Authority." Nevertheless, this same memorandum recommended extension of the procedure for another period of 60 days beyond November 12, 1934.

This cost filing procedure copied the ordinary price filing provision further by establishing, through code authority ruling, the observance of a five day waiting period before filed quotations could become effective. (*).

b. Marking Devices Industry.

The Marking Devices Industry Code contained a price filing provision in Article VII requiring the filing of price lists and of costing and pricing formulae for products not usually sold from price lists.

(*) Bulletin 3, malleable iron industry. In NRA files.

It provided also for a cost-finding system to be approved by the Administrator. A Bulletin issued by the code authority on December 23, 1933, (*) carried the information to members that:

"....a new and very comprehensive plan was adopted for our National Costing and Pricing Guides. The Plan is outlined in the attached memorandum and has received tentative approval by the Administrator. .... It is a natural development of the open price plan. The necessities of our Industry, including the circumstances under which our made-to-order products are sold and manufactured, require special interpretations of the usual operations of the Open Price Plan. .....

"National Costing and Pricing Guides

"National Costing and Pricing Guides shall constitute the standard estimating and pricing guides for all of the Marking Devices Industry throughout the United States. A map of the United States has been laid off in certain areas and Adjustment Factors have been allotted to each of these. These factors will compensate for inequalities in the inherent total business volume available in each given area. Also there have been set aside certain metropolitan areas where the total volume is of such significant character with respect to the balance of the area that it needs separate adjustment.

"The theory behind the use of these factors is that so far National Schedules have not given consideration to the important effect of territorial volume upon costs; and if planning did include this consideration, a single National Schedule would have to be issued on many different standards. Also, it is felt that territorial volume is a definable measurable influence upon costs, particularly in our Industry, that a large metropolitan area offers to the members of our Industry supporting volume on which to set up facilities, skills, volume purchasing, field organizations, cataloging, and the like, which would not be warranted in smaller volume areas; that because we have previously failed to take heed of the heed of the influence of inherent volume upon our costing, our National Schedules have failed to meet the needs of the country, and therefore have not had general acceptance and use.

"Therefore, hereafter our National Schedule (which will be called National Costing and Pricing Guides), will be standardized, simplified, and comprehensive guides from which Local Schedules and individual price lists and catalogs can be made. All customary products and services will be described and priced either through list prices and discounts or through formulas for estimating prices. They will show the unadjusted standard prices at which goods can be sold across the United States without selling below cost on a containing basis, by the average well managed member of this Industry; and when treated by the territorial factors these National Schedule Prices will be adapted to the conditions of the given areas, which can and will be supported by the buying customs and standards of that area.

(*) In NRA files, marking devices industry.

"Products and services will not be permitted to be sold in any designated area at prices lower than those reached by the National Costing and Pricing Guides when adjusted to that area by the maximum factor permitted in that area and by such quantity factors and/or conditions of sale factors or discount Plans as are authorized by the Guides approved by the Code Authority.

"There is no objection to the issuance of Local and/or the filing of individual Price Lists and Catalogs at price levels reasonably above the National Schedules as adjusted in the above manner, but any Local Schedules and any individual Price Lists and Catalogs, not previously approved by the levels than those set up by the National Schedules, so adjusted, will be immediately looked upon with suspicion and investigation will be made to ascertain:

"First: -- whether such schedules could result in sales below cost with respect to individual transactions or individual items; and

"Second: -- whether selling at the levels indicated will be harmful to the average member of the Industry; and

"Third: -- whether discrimination is indicated between purchasers of the same class or quality.

"If any filing offends in any of these three particulars, the Code Authority will issue a cease and desist order, and a refusal to file a corrected schedule will result in a request for prosecution by the Administrator."

The threat of immediate investigation in the event prices were filed below the national schedules should be noted, as well as the three tests to be applied to such prices. The determination in every instance that the challenged prices would be "harmful to the average member" might be anticiapted, since the National Guides were supposedly fair to the "average member.

Among the five things listed as being of primary importance to the industry by W. S. Lord, Secretary of the Code Authority in a letter to Walter Mangum, Assistant Deputy, May 8, 1934, (*) were:

1. The right to establish and enforce minimum prices for the customary products, and

2. The right to compel the proprietorial type of firm to charge into its costs the time of the owner at a fair rate.

(None of the other three listed had any reference to cost or price).

It should be noted that the bulletin quoted above stated that the plan had received "tentative" approval by the administrator. Later, objections were raised by the NRA which sought to forbid the use of these manuals. The industry resisted all efforts to eliminate the

(*) In NRA files, marking devices industry.

scheme, on the grounds that the pricing manuals were necessary, had been in use in the industry in some form for 25 years, and were really only suggestions for costing and accounting. Such importance was attached to the list that one letter from J. R. Swift, Chairman of the Code Authority to A. D. Ferguson, February 28, 1935, contained an indirect gesture to sacrifice the price filing provisions if necessary to secure the approval for the guides. The refusal of the industry to abandon the manuals led to a stay of the price filing provisions of the Marking Devices Code in March 1935. The records available do not indicate whether the price schedules continued to be used.

C. The Folding Paper Box Industry.

The open price plan of the folding paper box industry is of particular interest because of the ingenuity of the plan itself in applying a hybrid cost-price filing system to an industry having both standard and non-standard items, and, second, because of the graphic illustration of inconclusive and conflicting administrative action in relation to its adoption and use by the industry. The plan, itself, as it was put in operation by the code authority agents, Stevenson, Jordan, and Harrison, is included as Exhibit IV, Appendix C, because of its intrinsic interest as a complex variation of the ordinary open price plan and as a point of reference for the brief chronological references and description given here.

The enabling provisions of the open price article in the Folding Paper Box Code were almost identical with those for the other paper codes, in that it was permissive with the code authority to establish it, to designate products on which prices were to be filed, to determine the form of filing, and to investigate prices alledgedly below cost.

An early account of the proposed plan was found in a memorandum from the Research and Planning representative (M. D. Kossoris) who had been asked to submit his recommendations. The memorandum was dated July 1, 1934, and was addressed to W. W. Pickard, Deputy Administrator of the Paper Division. (*).

The proposal of the folding paper box industry was summarized as follows:

> "No member is to go on the open price basis as long as he estimates his prices by using the standard conversion rates formulated by the Code Authority as well as the current market price of raw materials. The standard conversion rates are based on the operation of a synthetic and efficient mill. But when any member wants to disregard these rates and use lower rates which he can actually justify by his costs, and when he wants to use either because he can buy them cheaper or because he manufactures them himself - he must go on the open price basis. On that basis he may sell down to actual cost,

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(*) NRA files, folding paper box industry.

both as to conversion and raw materials. When quoting on the open price basis he must file the price he is offering and expose himself to the price competition of all competitors interested in the particular type of business." (Underlining supplied)

The purpose of the proposal was described as two-fold:

"(1) To permit the combined mills i.e. the mills which both make their own paperboard and convert it into folding boxes - to sell all the way down to cost so as to be able to service large customers at prices satisfactory to them (or they will set up their own plants) and (2) to permit some degree of uniformity of estimating with the door wide open to fall below the standard figures whenever actual cost permitted. When using the standard factors, everyone would know the basis on which everyone else estimated his prices, without having to analyze hundreds of conversion factors filed by the other industry members. When on the open price basis, everyone who interested himself in the particular kind of business would know the exact price his competitors offered." (*)

The recommendation of the Research and Planning adviser contained no basic objection to the combination of cost and price factors in this plan, but objected only to the waiting period.

"The objection to this proposed combination of standard cost factors and open price limited by cost lies in the waiting period which must be observed when filing a price. According to Article VI of the approved Code, five days must elapse before a quoted price becomes effective. This period, in effect, carries with it a punitive result in view of the particular nature of the industry.

"As already indicated, all production is according to customer specification. Identification of the specific product for which an open price is filed is impossible without naming the customer. In quoting a price, a producer would be compelled to say 'I am bidding X dollars per thousand for 100,000 of Armour's 2 lb. sausage cartons.' In effect this will mean 'Boys, this is my price to Armour. Come on in and see if you can do better.

"The result may be heavy price competition with combined mills or even pure converting mills joining. The latter, in order to get into the business, will in turn exert pressure on the paperboard mills to lower prices - and the result may well be that it will be the paperboard mills which may carry the brunt of this type of competition.

"Much of this can be obviated if the waiting period is eliminated. Then a member will be able to file his price and have it effective at once. If he can sell to the customer at that price, well and good. If the customer wants to shop for other bids, he may do so,

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(*) Op. cit, above

but if the price is satisfactory to both customer and bidder, the latter ought not to be exposed to the sharpshooting of his competitors."

Other memoranda from Research and Planning supplemented this preliminary report, but did not approve the plan. Nevertheless, the plan, somewhat revised, was launched by the code authority during August, 1934. A letter sent out by the code authority to members on August 7, 1934 announced the postponed effective date of August 27, 1934:

OPEN PRICE PLAN

"In order that members of the industry may have further opportunity to register their customer and products in accordance with the procedure established and to allow time to complete arrangements for the operating organization, the effective date for the Open Price Plan as declared in FBA Order No. 12, is postponed from August 10, to August 27, 1934.

"As quickly as possible after forms are received, members should begin registration of customers and products with the Agent of the Folding Box Authority."

On September 4, 1934, a memorandum from Blackwell Smith, Legal Division, to the code assistant of Division III, indicated disapproval of the plan as constituting a code amendment:

"I concur in the statement of the Review Officer that this plan should not be approved. Approval of the Plan would amount to amendment of the Code and it would be in no sense an Open Price Plan procedure under Article VI of the Code.

"This comment is made without in any way discussing the objections which might be made to the Plan, even if offered in the form of an amendment."

There were two further memoranda of the same date, September 7, 1934. One was from G. K. Hamill, Research and Planning Adviser, to M. D. Kossoris, then Assistant Deputy Administrator, Paper Division.

"This is in reference to the Rules for Defining Cost Plan of Procedure adopted by the Folding Paper Box Code Authority as received from E. R. Boylan, Administrative Member, under date of July 28, 1934.

"There is no authority in the Code for establishing methods for arriving at prices or rules governing the operations of members under their own costs. Consequently, this Division regards the matter covered by the 'Plan of Procedure' as ones which properly should be handled as modifications of or amendments to the Code. The 'Plan of Procedure' is therefore disapproved as not falling within the scope of an open price plan of selling as provided for in Article VI, Section 2, of the Industry's Code."

On the same date, September 7, 1934, Mr. Kossoris addressed a memorandum to Robert J. Keebler, Legal Division, confirming an opinion as to the power of the code authority to establish the plan under the code grant of authority, without further action of approval: (*)

"On this basis of these facts you advised me that this type of open price provision as proposed by the Industry was within the power given in the approved Code to the Code Authority to declare an open price method of selling and that no approval on the part of the Administration was required."

The plan was in effect for several months prior to January 1, 1935, when the Code Authority for the Folding Paper Box Industry presented a brief at the Public Hearing on Policy relating to Price Provisions in Codes of Fair Competition. This included some description of the plan, and expressed full satisfaction with its operation as follows:

"3. That there has been developed and put into operation an open price plan suited to the conditions ofthis industry, and particularly adopted to the made-to-order characteristics of those products which are produced and marketed to fit the particular needs of each customer.

"4. That the application of the open price plan now in operation fits the needs of industry, has reduced vindicative and destructive price cutting, has stabilized labor conditions, and has brought into being conditions of known market values where no such knowledge had previously existed, and that without such knowledge neither stability nor fair competition may be enjoyed.

Dated just six days before the presentation of the above brief, January 4, 1935, a memorandum from W. J. Brown, Deputy Administrator, to Captain J. F. Battley, Acting Division Administrator, protested a pronouncement by members of the Legal Division that the open price plan as set up was illegal and unenforceable. (**). Excerpts from that memorandum are self-explanatory:

"The plan briefly, is this:

"1. On products for which no one has filed an open price, no competitor needs to file any price. But as soon as any Industry member files a price for the particular product, everyone else selling that product cannot sell at a lower price without so filing.

"2. Products on an open price basis may be treated in several different ways: (a) A member may choose to indicate his price level by using the current market price of raw material with conversion factors based on the costs of a theoretically efficient plant. The combination of the two would permit anyone to compute,

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(*) In NRA files, folding paper box industry.

(**) In NRA files folding paper box industry.

within a fairly narrow range, the price of a competitor using this system. (b) A member may simply indicate the product, identifying it by customers, since each of these has his own specifications. Any member selling to this customer or having an inquiry from him is at once notified of the prices on file.

"In connection with the presently operative open price method of selling in use in the Folding Box Industry, several questions have been raised because of the Industry's effort to obtain compliance. The issue resolves itself into whether or not the Legal Division can run counter to the express language in the Code."

(There follows a recital of the code provisions empowering the code authority to put an open price plan into effect, and notes that the Industry had proposed a plan but that it had met with objection from several of the Advisers).

"The Industry then developed another plan which met with the tentative approval of the Division of Research and Planning which recommended approval for a trial period of six months, frankly recognizing the experimental nature of the plan. (*) The proposal was discussed with R. J. Keebler, Counsel on Policy, who advised that the proposal needed no official approval as the language of the Code adequately covered it. A memo confirming this discussion was sent to Mr. Keebler on September 7, 1934, and a receipted copy left in our files."

"Recently the Code Authority sought to obtain compliance against a member who refused to file any prices at all. The regional counsel, Mr. George Bronz, refused to proceed on the grounds that in his opinion the language of the Code was not sufficiently broad to enable the Code Authority to prescribe the open price plan in question. In doing so, of course, Mr. Bronz puts his own interpretation on the mechanism of an open price plan."

"Mr. Bronz was requested to submit his objections for instructions from the Legal Division. In considering it, Mr. Scott, Managing Counsel of the Division, ruled that no Industry had the right to put into effect any kind of open price plan without specific NRA approval, in spite of enabling language of the Code.

"In view of the past developments in connection with the open price plans, and the specific wording in the Code, the attitude of both Mr. Bronz and Mr. Scott appear to be uncalled for. I request that this matter be taken up with the National Industrial Recovery Board to determine whether or not the legal advisers can impose their own views upon an industry in spite of any express language in the approved Code."

(*) The memorandum referred to was not located in the file.

The records available now do not show the results of this memorandum, nor the effects upon the folding paper box industry and the operation of the price filing plan. Comments in the Code History would suggest that voluntary compliance permitted its continuance, but efforts at enforcement were abandoned by the industry. (*)

(*) Further exploration of many of the points would be desirable, as well as further information on the performance of the unique plan.

B. CONTROL OVER PRICE CHANGES - THE WAITING PERIOD

The most immediate effect of the mandatory price filing requirements in NRA codes was to limit the freedom of an individual seller to alter his own prices or terms at will. The traditional prerogative of "prices subject to change without notice," no longer existed under price filing plans which stipulated that all sales must be in accordance with filed prices, and that all changes in prices must be filed with a central agency before they could become effective to the trade. (*) This limitation existed whether or not there was a waiting period; its importance was, of course, magnified by the presence of a waiting period.

The waiting period was the most obvious feature for control over price change in NRA price filing plans; and, for this reason, the most controversial element involved. In the following discussion attempt is made to determine the significance of the waiting period in the light of its role in price filing activities. The waiting period may be defined as that period between the filing of prices and price terms with the code authority or other agency and their effective date. The term applies to the period between the original filing of prices and their effective date as well as to the period that must elapse before price revisions can become effective.

1. Waiting Period Requirements in Codes

Requirements in codes varied from the simple prior notice to the code authority or other confidential and distinterested agency to waiting periods of from 1 to 20 days before the filed price could become effective.

Of the total 444 open price codes, 136 made no provision for a waiting period. The preponderance of this number, 103, provided that prices were effective immediately upon receipt by the agency, 6 required acknowledgement of the filing by the agency before becoming effective, and 27 permitted prices to be effective even before receipt by the agency. One hundred and forty codes provided for a waiting period before any revision of prices; 113 of these were stayed in the Order of Approval. One hundred and thirty-two codes required waiting periods before downward revisions only, of which provisions 70 were stayed. In 23 codes not specifying a waiting period, provision was made for the establishment of a waiting period at the discretion of the code authority. Administrative approval for this action was required in most instances.

Of the 272 codes which required waiting periods either before any revision or before downward revisions, 212 allowed for a shortening of the period for prices filed to meet competition. One hundred and twenty two permitted prices to become effective on the same date as a revised competitive price, if such prices were not lower than the prices being met; 77 codes permitted revised prices to become effective on the same date as a previously filed change without specifying that it must not be below such competitive price; 13 required that prices revised to meet competition

(*) See the Table in Appendix C, Exhibit II, for a list of the few industries permitting change without notice.

be filed before a certain part (1 or more days) of the waiting period required of the first filed revision had elapsed. Thirty codes authorized the code authority to lengthen the waiting period with administrative approval generally required in most instances. (*)

A majority of waiting periods incorporated in codes, it may be seen from the above, were stayed by the Administration. After the passage of Office Memorandum No. 228 in June, 1934, few open price provisions were approved which contained waiting periods. The Administration except during the first six months was on policy grounds consistently opposed to their inclusion in codes. (**)

Industry attitudes, on the other hand, were preponderantly favorable towards waiting period provisions at all times. The arguments for waiting periods remained constant from the pre-code period until the last of code days. Proponents of the waiting period maintained that their original contentions were borne out by operating experience - that the economic effects of operating under waiting period provisions justified their original attitudes. The force with which waiting periods were urged by industry members is illustrated by the following statements:

In the brief filed by the Code Authority of the Diesel Engine Manufacturing Subdivision of the Machinery and Allied Products Industry, it was stated, "We feel also that a waiting period is a most essential part of an open price list exchange for best results. "(***) Much stronger was the expression in the brief filed jointly by the supervisory agencies of the compressed air, heat exchange, pump manufacturing and laundry and dry cleaning machinery industries: "In so far as the waiting period is concerned the four industries in question state unqualifiedly that without the waiting period the filing and distribution of price lists would be a useless expense in so far as chiseling and destructive price cutting is concerned." (****)

Condemnation was directed at the Administration for denying or staying waiting period provisions by several industries:

> "By denying us a waiting period of at least 10 days, the NRA has made possible the bulk of our chiseling to date." (*****)

(*) Division of Research and Planning, NRA, Analysis of Trade Practices, Provisions Relating to Open Price and Bid Filing Systems - Appendix C, Exhibit II.

(**) Exceptions to Policy were made in a few instances, notably in the lime and cement industries. See page 476 below.

(***) Transcript of Public Hearing On Price Provisions in Codes of Fair Competition, Volume S-IX, page 2806, NRA files.

(****) Transcript of Public Hearing On Price Provisions in Codes of Fair Competition, Volume S-VI, page 2060, NRA files.

(*****) Statement of H. H. Harris, member of the alloy castings industry code authority transcript of public hearing on Price provisions in Codes of Fair Competition, Volume H-III, page 1363, NRA.

"...if honest manufacturers are to have any protections from 'chiselers' it (open price provision) not only is worthless but has developed into a real menace because of the suspension of the waiting period."

"...unless the suspension is lifted from the waiting period, the filing of prices will become entirely valueless if not destructive and will have to be given up." (*)

"The one unfortuante part about the open price filing codes is the fact that they took the waiting periods away from us. The experience that I have had in our industry definitely indicates the need of a waiting period to prevent the mentally dishonest member of the industry from taking advantage of the mentally honest ones." (**)

The central issues around which controversy over the waiting period developed were two: (1) its use as a period of pursuasion or coercion against members reluctant to adhere to price standards or levels conceived to be proper by the agency or by certain members or groups of members within the industry; and (2) its use as a period within which to publicize fully the price offers of competitors before permitting them to become effective. (***)

The material presented below is largely of a qualative character, representing in considerable part a statement of the arguments of both opponents and proponents of waiting periods as derived from the testimony at the Price Hearings held by the National Industrial Recovery Administration from January 9 through the 12th, 1935. At this time both opponents and proponents could base their arguments on experience. The evidence is supplemented by correspondence and records of the administrative agencies which indicated the use to which the waiting period was put and from complaints of industry members indicating the extent to which they had actually been influenced in their price behavior by the existence of the waiting period - either through voluntary choice or because of pursuasion or coercion from others.

(*) Statement of D. S. Hunter "representing 8 comparatively small industrial groups which have supplementary codes under the Fabricated Metal Products Manufacturing Industry". Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Vol. S-V pages 1544 and 1546, NRA files.

(**) Statement of Frank A. Bond for the Chain Manufacturing Industry Code Authority. Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume H-III, page 414, NRA files.

(***) The latter issue concerns more the publicity than the control function of price filing. Its discussion, however, has been confined to the present chapter because the extended controversies that developed make it desirable to bring together in one place all of the material bearing on the waiting period.

2. Use as a Device For Coercion

The fact that coercion existed in connection with some open price plans was rather clearly established in the report on open price filing made by the Consumers' Advisory Board in May, 1934. This present study has not added any significant amount of evidence on the prevalence or location of specific cases of such coercion and no attempt has been made to summarize the material elsewhere available. (*) Such evidence was obtained chiefly from those members of open price industries who experienced such pressure.

(*) See: Experience with the Open Price Provisions of Approved Codes, Consumers' Advisory Board, Report, May 24, 1934, pages 4-10 Chapter II deals with The Prevalence of Coercion. A complete record of cases of pressure against low price enterprises which were reported by industry members in response to a questionnaire sent out by the CAB is attached to that Report as Appendix B. On page 4 of the Report the following summary of industries reporting such cases is presented.

Code No.	Industry	No. of Cases
4	*Electric	4
26	Gasoline Pump Mfg.	1
55	Compressed Air	1
57	Pump Manufacturing	2
58	Cap and Closure	1
39	*Marking Devices	1
62	Steel Tubular and Firebox Boiler	1
63	Plumbago Crucible	1
66	Motor Bus	1
77	Crown Manufacturing	1
81	*Copper and Brass Mill Prod	1
88	*Business Furniture, Storage Equip.	3
90	*Funeral Supply	3
98	*Fire Extinguishing Appliance Mfg.	3
99	*Asphalt Shingle and Roofing	1
107	*Ladder Manufacturing	3
108	Motor Fire Apparatus Mfg.	2
109	*Crushed Stone, Sand, Gravel & Slag	1
120	* Paper and Pulp (Cardboard Mfers, Div.)	1
123	*Structural Clay Products	1
136	*Vitrified Clay Sewer Pipe Mfg.	1
137	Warm Air Furnace Mfg.	1
149	Machined Waste Mfg.	2
156	*Rubber Manufacturing	4
176	*Paper Distributing Trade	1
186	End Grain Strip Wood Block	1
187	Cotton Cloth Glove Mfg.	1
205	*Metal Window	1
236	Cooking and Heating Appliance Mfg.	1

* Industries included in Open Price Filing Study sample of 57 codes.

One specific illustration of pressure is included here because the incident itself revealed the unusual incentive to coercive pressure arising from the knowledge that a proposedlow price would be widely publicized. (*) A large distributor was anxious to contract with a member of the industry for its complete supply of the product over a period of a year at a price which was below the prevailing level of filed prices. The manufacturer considered the price to be above his cost and, therefore, filed this price with the code authority.

The receipt of such a price caused the code authority secretary to make personal contact with the manufacturer. In the meeting which followed between representatives of the manufacturer, the purchaser and the code authority secretary, the latter objected strongly to the filing of the new low price on the grounds that, if published, this price would be immediately met by all members of the industry. The fact that there was a ten-day waiting period served to intensify the probability that competitors would meet the cut and there would be no limit to the price cutting which would follow.

One observation should be made in respect to the illustrative material included in the 1934 Report of the Consumers' Advisory Board, as well as other material examined and the case described above. The material suggests that general code authority rulings compelling adherence to arbitrary group standards of price or pricing methods were far more common sources of coercion than were all night sessions of persuasion or attempts to black-jack a low filer with threats of economic sanction. Such rulings avoided the direct frontal attack on the low filer since the procedure became technically one of enforcement, although in reality it was illegal coercion to force compliance with unauthorized code regulations. Such rulings were associated with th the pseudo-administrative power of the code authority or its agent, and hence did not depend for success or threats. Such regulations naturally hampered most the members who engaged in aggressive price competition, who were less willing to abide by uniform group rules and to forego any competitive advantages. In the words of many industry members, they were the "chisellers," who might well have been subjected to crude coercive measures if there had not been available the safer and more effective methods of compelling compliance with the desired standards. (**)

The effectiveness of such extra-legal requirements as coercive devices was, of course, reduced as members became more familiar with their rights under the code and more ready to appeal to the Administration to assure them

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(*) A Resume of the Conversation between members of the companies and the code authority secretary was submitted to the Consumers Advisory Board, 12/28/33. with the request that the names be kept confidential.

(**) Cf. Illustrative material in sections on customer classification, cost floors, distributor controls, product classification in this chapter.

those rights. Nevertheless it is fair to assume that many members subjected to such arbitrary requirements were not clear as to the scope of code authority powers conveyed in the code, and that others were intimidated by potential economic pressure from exercising their privilege to lower prices below the group standard.

The form of coercive activity discussed above has no necessary or direct relationship either to the waiting period or to the identification of sellers in disseminating price information, although both of these elements may facilitate the process. The remedy would seem to lie in a careful drafting of price filing provisions to delimit code authority powers strictly in terms of procedural detail and content and to maintain continuouse public supervision of price filing operations.

Attempts were made at the January, 1935, Price Hearings by industry representatives to refute the charge that waiting periods were used to provide a period during which competitors may coerce or persuade a member of an industry into withdrawing a newly filed lower price before it becomes effective. The brief filed by the Cement Code Authority maintained that this contention was never demonstrated in practice, continuing that "On the contrary, it would seem that any fear of retaliation which influences a member of industry in determining the price of his goods exists without reference to any waiting period or even to any open price plan." (*)

Herman H. Lind, Executive Officer of the Machine Tool and Forging Industry said that "a careful analysis of price changes filed in our office indicates only a single instance of a price once changed being withdrawn either during the waiting period or for a short time thereafter, and the single change was the result of an error." However, he suggested that "If there are indications that the waiting period has been used to bring pressure to bear by competitors on sellers who have reduced their prices to have them change them that abuse could be avoided by a provision that price changes once amended cannot be withdrawn before the expiration of the waiting period except where obvious errors have been made." (**)

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The code authority secretary of the brake-lining division of the asbestos industry made the following comments on the use of the waiting period as a deterrent to price change. (***)

(*) Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume X-III, page 830, NRA files

(**) Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume H-I, pages 66 and 67, NRA files

(***) Minutes of Division Meeting, January 9, 1935, NRA files

> "The objection raised by NRA theorists is that if anyone files a lower price, some one else comes along, threatens him and forces him to revise his price before the five days are up. I don't believe such threats will ever be effective in this industry. As it stands now anyone can go in and arrange, verbally the details of an order, then file the price and no one has been given an opportunity to meet the price. Everyone I have consulted feels that one of the things to be done was to make everyone realize that if anyone should cut the price, he would promptly be met and he would not get the order."

The manager of the laboratory supplies section of the scientific apparatus industry also stated that in his experience there has been no pressure brought to bear during the waiting period to coerce any member to revise prices upward or downward, but the procedure did tend to prevent violent and unjustified daily fluctuation to secure a particular order. (*)

The executive chairman of the Ice Code Authority denied the contention of opponents of waiting periods that waiting periods promote collusive price-fixing. He said:

> "This provision does not serve to promote collusive price-fixing in any degree. On the contrary, it very definitely serves to prevent the development of those demoralizing and destructive market conditions which tend to force competitors into collusive agreements in order to save their economic lives. Because of the standard nature of the products and other characteristics of the industry which we have already discussed ice prices must necessarily be uniform in any market where a destructive price war is not in effect--the lowest price-minded member of the industry in a market, therefore, establishes the price for the entire market..."(**)

The vice chairman of the Retail Lumber and Building Material Code Authority made a statement which suggested that the waiting period might be used to fix minimum prices when he said, "We favor the fixing of minimum prices, but if such a method of cost protection is not feasible or is deemed contrary to the public interest, then we favor and strongly recommend open price filing with a reasonable waiting period." Later he stated that the only reasons for asking for a waiting period were to allow time necessary to notify and so that price "will become effective, and in an enforceable way, and without expense." (***)

(*) Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume S-VI, page 2068, NRA files.

(**) Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume H-III, page 1132, NRA files.

(***) Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume H-IV, pages 1769 and 1772, NRA files

Because of the comprehensive and constructive nature of the statement of the President of the Machinery and Allied Products Institute, Mr. O'Leary, that portion of his statement dealing with the waiting period is quoted rather fully as follows:

"We know of no abuses that have occurred in our industry (in connection with open price filing), and we believe that we should follow and definitely carry out open price filing in every one of the industries that desire it, with waiting period.

"The waiting period provisions have been stayed in the great majority of the codes applicable to subdivisions of this Institute. Accordingly, we have had little opportunity to observe the effect of such waiting periods in practice.

"As illustrative of a broad principle of code administration, however, the variety of need of open pricing with waiting periods among the 58 subdivisions of our Institute is worthy of attention. Some of these subdivisions feel strongly that their products are so far from standardization, so special in their adaptation to the needs of particular installations that neither open price filing nor waiting periods can be helpful in their pricing problems. Other subdivisions hope that as time goes on they may be able to develop sufficient standardization and classification of products that such provisions will prove beneficial. Others again feel that both provisions are absolutely imperative if their industries are to be saved from an endless struggle that not only eats up the slender working capital that remains to them after these years of adversity, but stifles new design and all other progress in the development of their products and their market.

"This variety of experience, within the confines of a single and reasonably well coordinated group of industries, demonstrates the value, perhaps even the necessity, of giving careful consideration to the particular situation and needs of each narrow type of industry in seeking suitable regulations of its pricing policies.

"The Administration has shown its scepticism as to the effect of waiting period provisions by originally staying their operation as to all codes adopted subsequent to the date of the stay, and by keeping that stay alive to the present time.

"We do not wholly share the doubts of the Administration as to the advisability of these provisions, but submit that this again is a matter requiring treatment in view of the varying circumstances of the industries. It is clear that if it should be made the rule in any industry that the manufacturer cannot change a filed price until after his new price has been filed for some specified number of days, that waiting period does offer an opportunity for his competitors to present arguments to him as to the fairness and propriety of his new price.

Such provisions may also be open to other so-called abuses of which we are not aware. Nevertheless, such a waiting period has very distinct advantages and it is our feeling that such provisions should be given a broader trial, eliminating any abuses which may develop, while still conserving their advantages.

"We wish to suggest the following considerations in favor of further and broader tests of the waiting period provisions:

"(a) A mere requirement for the open filing of prices without a waiting period leaves open the possibility that any manufacturer may make a special price to one consumer merely by filing that price for a brief period and promptly withdrawing it. A waiting period does have the advantage of eliminating that possibility. Prices must be effective for some definite period of time, at least sufficiently long to permit other competitors to come in on as favorable a basis as every other.

"(b) Most of the manufacturers in our subdivisions distribute their products over wide areas and many of them have national distribution. In order that competitors as well as consumers may be advised of filed prices, it is necessary that information as to such prices shall be distributed by the Code Authority over large areas. It is not practicable to advise all parties by telegraph or telephone of constant changes in price. The waiting period does offer an opportunity for distribution of this information so that employers and consumers on the West Coast will be advised of the new prices equally as advantageously as employers and consumers on the East Coast or in the Middle States.

"(c) A waiting period does tend to equalize the opportunities for both larger and smaller employers. Business is always in flux; changes are constant in prices of materials and in methods of manufacturing and distribution. The small enterprise is often at a serious disadvantage in reflecting these changes in the price of its product. The larger enterprise usually has a correspondingly larger staff of estimators and is often more alert to make its prices fit the current conditions. The waiting period does give the smaller manufacturer an opportunity to notice price changes by its larger competitors and a corresponding opportunity to change its own prices to meet the new prices filed by its rivals.

"(d) From the standpoint of consumers there is an additional advantage in the waiting period. Prices may go up as well as down. The machinery buyer requires time for the study of competitive design of products, relative efficiency and price. The fact that prices cannot be changed

for a limited period should operate to give the buyer an opportunity to compare the relative merits of products that are offered to him with the assurance that there will be no adverse change in price during the period in which he is engaged in such studies." (*)

After the completion of his statement, Mr. O'Leary was questioned by Mr. Smith and Mr. Henderson on the subject of his attitude toward the waiting period provision. His attitude during this questioning is summarized in his statement, "Open Price policy, definitely, is not of great value to many industries without a waiting period and of no value to our industry." (**)

The above denials of the use of waiting periods as periods of coercion or persuasion serve to show the emphasis which proponenets placed upon another function of the waiting period, viz., to provide sufficient time to publicize fully the price offers of competitors before they become effective. Evidence bearing on the significance and uses of the waiting period in this connection is presented in the following section.

3. Use As A Period To Publicize Fully The Price Offers Of Competitors.

a. To Afford Ample Time For Dissemination.

The number and geographical distribution of industry members, in any other than a small, highly localized industry, it was claimed, makes a waiting period imperative in order that all members may have an equal opportunity to become acquainted with the competitive facts as well as that all customers and other interested parties may have an equal opportunity to be made aware of price changes. The number and geographical distribution of industry members should be largely the determining factor with regard to the length of the waiting period. "If the open price plan itself is economically sound, all interested parties must have as equal an opportunity as possible to avail themselves of the current conditions of competition. The more this is assured, the more competition there will be, for competitors cannot compete if they do not know when, where, how or with what to compete." (***)

The candy manufacturing industry is an example of an industry which, it was asserted, would have benefited from a waiting period because of its geographical structure. The Code History discusses the problem as follows: (****)

(*) Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume H-I, pages 103-07, NRA files.

(**) Ibid, page 119.

(***) Brief submitted by the Code Authority of the Cement Industry Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume S-III, page 831, NRA files.

(****) pp. 78-80 Note: Waiting period stayed in the Order of Approval.

"In an industry of this size scattered as it is over almost all of the 48 states with some members distributing through the country and others only in their own locality, an open price plant without a waiting period merely puts a premium upon the last in turn to meet the precise terms of the filing of a change in price at a later time when the competitors learn of the change in price. During this period the member is in a position to "clean up" because of his lower price which other members of the industry might readily have met had they known of the change prior to the effective term of such change. Hence in this industry the absence of a waiting period has served to keep the price structure "churning" rather than to stabilize it. Had the Code continued, it is likely that an application for the stay or the elimination of the open price plan would have been made by the Code Authority."

F. Sims McGrath, attorney, representing the Asbestos and Asphalt and Shingle Roofing Industries Code Authorities, defended the waiting period in his reply to Mr. Thorp's question as to how important he felt that 5 day waiting period is to the functioning of the open price system. He said,

"Well, the members of the industry feel that it is important, but I do not feel that it is as important as in some industries. Nevertheless, take the Asphalt and Shingle Roofing Industry. The manufacturers who compete with each other are scattered all over the country. It does take a few days. It need not be 5 days--perhaps 3 days would accomplish it; but in all of them it takes some period of time to notify them, so that they can lower their price to meet the lowered price of the competitor and prevent a raid. Now that is what I suppose all business men like to prevent--the jackal practice of somebody who jumps in and gets some business at a low price from a competitor and immediately puts his price up again. They don't like that, and it seems to me that also leads to discrimination." (*)

The above statements illustrate the need felt in some industries for a period to disseminate price lists before their effective date. The alternative suggested, and indeed provided in Office Memorandum No. 228, that price lists be wired or telephoned immediately upon receipt by the

(*) Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume H-III, pages 1449-50, NRA files.

price filing agency, was said to be impracticable and costly, particularly where there were a large number of members scattered widely throughout the country and where price charges occurred with great frequency.

b. To Afford Opportunity to Meet Price Charges Instituted by Competitors and Thus to Promote Stability in Prices.

Several statements of industry members quoted above, (*) in which it was denied that waiting periods were used as period of coercion, throw light on what is probably the more significant function of this aspect of price filing plans. One aspect was stated clearly by the Code Authority secretary of the Brake Lining Division of the Asbestos Industry when he said that:

> "As it stands now anyone can go in and arrange, verbally, the details of an order, than file the price and no one has been given an opportunity to meet the price. Everyone I have consulted feels that one of the things to be done was to make everyone realize that if anyone should cut the price, he would promptly be met and he would not get the Order " (**)

To be distinguished is the following statement of Mr. O'Leary, President of the Machinery and Allied Products Institute, in that it does not say definitely that the waiting period will result in price maintenance but emphasizes rather its function to give competitors an equal opportunity for securing particular orders:

> "A mere requirement for the open filing of prices without a waiting period leaves open the possibility that any manufacturer may make a special price to one consumer merely by filing that price for a brief period and promptly withdrawing it. A waiting period does have the advantage of eliminating that possibility. Prices must be effective for some definite period of time, at least sufficiently long to permit other competitors to come in on as favorable a basis as others". (***)

These two statements have the one thing in common that they look to the waiting period as a device to promote stability in prices, one by eliminating the incentive for price reductions, the other by reducing the incentive for special price concessions to secure particular orders followed by prompt withdrawing of the price. That waiting periods would promote price stability was frankly and frequently urged by industry members. The exact manner in which this would occur was less often made

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(*) See pp., 217-221 above.

(**) Above.

(***) Above.

explicit. The following quotations are typical.

Mr. Bladwin, Executive Officer of the Code Authority for the Radio Broadcasting Industry, in reply to questioning by Mr. Smith as to the relative importance of the waiting period and the simple announcement of current offerings of price, said,

> "Well, I think, Mr. Smith, generally the waiting period tends to substitute prevention for cure. And I am speaking now of our own industry. If a radio broadcasting station, under this code, is going to be permitted to change its rates at will without filing over a 15 day period, then there can be no stability in rates whatever, because with that, the seller-by that I mean the salesman who is working for the Commission or for the station--every time that he meets with a tough customer, he knows that under the code he is permitted to establish a new rate. He can file it today or he can file it tomorrow. Now, when that happens, every broadcasting station in that trade area must do exactly the self-same thing, and we might go back to the days when one salesman will be following the other all over town, trying to find out just exactly what price he is selling at." (*)

The Code Authority for the Lime Industry maintained that since chiseling was effectively eliminated through these provisions, "reasonable price levels, therefore, are maintained, and price wars, both offensive and defensive, no longer prevail. The effectiveness of these open price provisions lies in the waiting period. Were that to be eliminated, the open price policy would become worthless overnight." (**)

Although not making it entirely clear why the waiting period is essential to the fulfillment of the obligation of natural resources industries, the Lime Industry Code Authority further claimed,

> "There is a deep moral obligation upon all natural resource industries to make available as raw materials, the natural products which are our heritage, and to furnish these products as efficiently, as economically, from the standpoint of conservation of natural resource, and at as low a cost as possible and to produce as high grade products as human ingenuity can devise. Furthermore, such raw materials should be distributed to consuming industries under conditions wherein a degree of stability will be imparted to such consuming industries. To ensure the fulfillment of this obligation,

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(*) Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume H-IV, pages 1652-53, NRA files.

(**) Brief, Transcript of Public Hearing on Price Provisions in Codes of Fair Competition. Volume S-VIII, pages 2443-45 NRA files.

and to bring about a permanent degree of stablization, the open price provisions of the code, together with a suitable waiting period and the basing point provisions are necessary ....."(*)

In certain service industries, when the service offered is an integral part of the cost of the customer's product, it was argued that it is necessary for the customer to know the amount of this expense item in order to compute costs intelligently and set prices accordingly. Thus, instead of a gradual downward adjustment in prices that may be set in motion by the occasional granting of more favorable transactions here and there, there is a greatly enhanced value put on the first transaction that is legally completed at a lower price, and correspondingly great incentive to every individual in the group to refrain from that first "bargain" regardless of whether or not there is a waiting period. This the customer cannot do if prices fluctuate from day to day. The merchandise warehousing trade offers an example of this type of industry. The secretary of the code authority said,

"It is economically unsound for rates and charges in public warehouses to fluctuate from day to day. It is necessary for manufacturers, importers and other warehouse-users to know in advance of their sales what the cost of delivery is to be. There is need for them to know what the warehousing factor is in their distribution expense, just as they know what the railroad rates are for the transportation of their products. They want to know also that their competitors are paying no less than they are for public warehousing service in their various competitive markets. It is, therefore, in the interest of the public served that the rating procedure in the Merchandise Warehousing Trade have stability, and that changes in rates and charges be made by orderly process, just as with other agencies utilized in the movement of goods from factory to consumer. We know of no other way by which this stabilization may be maintained except through the publication and filing of tariffs; and a 30 day waiting period, usual with other agencies in distribution would be more efficacious than a 10 day period that the trade's code now provides for." (**)

The Code Authority for the Corrugated Pipe Industry was more specific about its experiences since the stay of its waiting period:

"The experience of this Code Authority during the past six months, attempting to operate under an open price policy without a waiting period, has created two significant developments: First - a general lowering of prices all along the line until products are now being sold at a level below

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(*) Brief, Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume S-VIII, page 2453, NRA files.

(**) Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume H-III, pages 1424-25, NRA files

the cost of doing business, this, in spite of the fact that demand and volume have shown an increase; Second - the trend of business is moving toward the larger manufacturers and being lost by the smaller companies. Although the first chisler is usually the small producer, he creates a situation wherein the larger companies must continually lower their price level in order to compete. Since a large company can exist longer and more successfully under a price war, the small producers are gradually forced out of business. This latter trend is also definite, and the smaller manufacturers in the industry have indicated in no uncertain terms the need for a waiting period under the open price policy." (*)

The Code Authority for the Scientific Apparatus Industry claimed,

"Our records show that such price changes as have been registered with the filing agency are not upward, but downward revision. Many of our products are sold exclusively to Governmental Purchasing Agencies, where the lowest price is the determining factor in the award. If downward price revisions were to become instantly effective--without a waiting period--it would simply constitute an inducement for members bidding on Governmental contracts or purchases to immediately file and bid below the lowest prices on file, for the purpose of securing a particular award, and at once refiling increased prices for use in the general market. Our industry has already suffered much from this kind of practice on the part of those not previously known as members of the industry. The result, in most cases, has been to take work away from those in our industry who are being paid skilled workers wages and give it to those outside the industry where a much lower wage scale is in effect...." (**)

It was claimed also that members may be prevented from making a rash change on any sudden impulse of anger or suspicion by the presence of a waiting period. It was stated that in an industry such as the ice industry, where the basic elements of cost vary little, there is no economic justification for any rapid fluctuation in price. (***)

(*) Brief, Transcript of Public Hearings on Price Provisions in Codes of Fair Competition, Volume S-II, page 692, NRA files.

(**) Brief, Transcript of Public Hearings on Price Provisions in Codes of Fair Competition, Volume S-VI, page 1751, NRA files

(***) Statement of Mount Taylor, Executive Chairman, Ice Code Authority Transcript of Public Hearing on Price Provisions in Codes of Fair Competition, Volume H-III, page 1151

In other cases, especially where the product was complex and required much engineering, it was contented that the waiting period was essential to prevent blind and haphazard meeting of prices. The situation of the diesel engine industry is a case at point:

> "We have stressed in the foregoing the complexity of our situation and have mentioned the thousands of parts involved in a large diesel engine. Whether these are bought or manufactured, the labor of estimating the cost of an engine is great. Some time should be allowed for this after knowledge of a competitive price change, in order that each manufacturer can appraise his situation in the light of facts rather than follow competitive prices up or down in blind fashion." (*)

The machine tool and forging industry is another which said that a vast amount of engineering, which is a matter of cooperation between the technical staffs of the buyer and the seller for the purpose of determining proper tooling and arrangement, necessitates that time be allowed for adjustment of prices to costs.

It should not be concluded from the statements presented above that price filing with a waiting period will always work towards a greater stability of prices. It has been seen that theoretically the effect of the waiting period in reducing the initiative for price change depends upon the rapidity with which sellers receive notice and adjust to price changes as compared, on the other hand, with the rapidity with which buyers receive notice and object to price changes. (**) The practical importance of this consideration, however, is diminished by the fact that evidence indicates that few buyers under codes received price information. (***) Two other factors are pertinent in consideration of the function of the waiting period in promoting price stability. One is the extent to which a competitor may have the farsightedness to know that price reductions, for example, may be met by competitors and that the consequence of such meeting of prices may be unprofitable to him. (****) The other is the extent of the information which he receives about the pricing policies of his competitors. Obviously if he is suspicious that his competitors are not adhering to their filed prices and terms or are granting secret prices which are not in any manner filed he too will resort to secret pricing.

(*) Brief submitted by the diesel engine industry
Transcript of Public Hearing on Price Divisions in Codes of Fair Competition, Volume S-IX, page 2806, NRA files..

(**) Above, pp. 60-83.

(***) Above, pp. 158-162.

(****) See above, pp. 50-52.

There is evidence to indicate that secret pricing was prevelent under certain NRA price filing plans. (*) In such a situation the waiting period can have little if any significance as a deterrent to price changes.

On the other hand, it should not be concluded that without a waiting period price filing can have little or no deterring effect upon price charges. Consideration of the possible influence of a requirement for prior notice of change in deterring individual price changes has, under the NRA, been confined largely to the effect of a "waiting period". It was the latter device that was most commonly recognized as the "control" element in price filing. The announcement of policy against the waiting period which accompanied Office Memorandum 228 was considered by many to constitute a definite retreat from the control to the simple publicity function of price filing, and a restoration of the Eddy plan of price filing for information only.

Actually the retreat was far less significant than that, even as a policy decision. (**) The elimination of the waiting period did not result in a change from the reporting of future prices to the reporting of past prices. It did not, strictly speaking, result even in a change from future to current prices, because members were, according to the model provision, obligated to adhere to their filed prices until notice of an impending change had actually reached the administrative agency or code authority. In some instances, it was required that the member must await notice of receipt of the changed price before putting it into effect. (***)

This filed price indicated not only the current price at the time of filing, but the price until further notice. The waiting period was extremely foreshortened by the new policy but its influence was not entirely eliminated, if we consider its primary function to act as a deterrent to price changes and not as a period of coercion or persuasion.

The requirement in the Sugar Institute plan, that price changes be posted not later than 3 P.M. preceding their effective date was, in effect, little more than a requirement of prior notice such as was provided for in Office Memorandum 228. But the decree handed down by the lower court in the Sugar Institute case would appear to deny the right of concerted action by an industry to file either current or future prices. The controlling feature, according to one writer, was the agreement to adhere to the posted price pending notification of change. The decree expressly excepted only past or closed tranactions. (****)

(*) See above, pp. 147-150.

(**) The practical significance of the decision on existing price filing plans was, of course, minimized by the limited application of the new policy, See. pp. 465-477 below.

(***) This might perhaps be implied by the requirement in Office Memorandum 228 that the administrative agency must notify the members by telegram or equally prompt means of the time of arrival.

(****) Cf. Handler, op. cit., p. 11 and the discussion of the Sugar Institute case, pp. 22-23 above.

The later statement of policy, in the statement of the National Industrial Recovery Board, April 23, 1935, decried the use of a waiting period because it was "likely to freeze a competitive process which should be kept active." It stated further that:

> "In an open price market there is no counterpart of such a devide. While prices are rising a flood of orders during a waiting period may unsettle a future market. When prices are too high the incentive to reduce them in order to get more volume of sales may be lessened by the knowledge that price reductions will not become effective until competitors, by similar reduction, have destroyed most of the sales advantage."

The same remarks are, to a lesser degree, applicable to any price filing plan that requires prior notice of change. The communication facilities of telegraph and telephone can reduce any period of sales advantage after prices reach a central agency to a negligible period. If sellers are widely scattered, filing on a regional basis can be established. The publicity given to any lower price assures that it may become generally known and that repercussions in the way of general reductions of prices or retaliatory price cutting are more immediately probable.

C. Price Filing and Control over Certain Elements of the Price Structure.

1. Introduction.

As contrasted with efforts to control price levels, which have been generally regarded as price fixing, industries have, in the past, been allowed some degree of freedom in efforts to regularize their price structure through standardization of products, cost formulas, trade differentials, contract forms, and methods of price quotation. As voluntary activities of trade associations such effort had been encouraged in some instances through trade practice conferences conducted by the Federal Trade Commission.

It is not necessary to explore here the incentives, the origin, or effects of such voluntary activities except as they affect or are modified by price filing. Some indication of the relationship of cost formulas and gross cost lists to price filing has been given in a previous section. It is apparent that plans such as those described in the malleable iron industry and the marking devices industry (*) introduce a control over the total structure or pattern of price relationships within the industries far beyond that of a simple no-selling-below-cost provision. It is proposed in this section to explore means of regularizing certain specific elements of the price structure, as they are related to price filing, including (1) product classifications, (2) customer classifications, (3) geographic pricing devices, and (4) discounts and similar terms and conditions of sale.

The advantages of regularization of the price structure in connection with the mechanical operation of and effective publicity under an open price plan have been recognized by previous commentaries on open price filing and have been touched on in Chapter III (**). Comparability of prices and price terms is extremely difficult unless some standardization of products, price elements and methods of quotation exists. The publicity associated with the price filing procedure cannot be attained without some common understanding of product, grades, quality and other specifications, and the mechanics of filing and disseminating prices are much simpler when the variations in pricing practices are few and publicity can be limited to changes in one or a few elements of price rather than variations in a multitude of price elements unrelated by any fixed pattern.

Such standardization eliminates many of the causes for incomplete filings and limits the possibility of evasion or secret price-cutting through substituting a product of higher grade or quality for one of a lower grade, by applying a wholesale discount to a retail order, etc. On the other hand, such a regularization may involve a control or limitation of the individual's pricing policy in a manner which confines competitive pricing within very narrow limits or prevents it entirely.

(*) Above, pp. 201-211.
(**) Above pp. 118-119.

Many of the gross price lists, product classifications, and trade practices made mandatory under codes were elaborations or continuations of methods that had been worked out some time previous to the NRA. The effect of the price filing plan in these industries was to make mandatory the use of such pricing practices by the entire industry rather than by that portion of it that had voluntarily adhered. With price competition confined to a relatively few elements, complete uniformity was much more readily attained, both in those instances in which it arose from the voluntary re-filing to meet the prices of competitors, and in those in which it was deliberately sought by agreement. When there are multiple elements of price, many intermediate steps of uniformity are involved in the creation of a uniform net price between competitors and many more price elements are available for juggling by competitors seeking a more advantageous combination of terms, discounts, differentials or allowances.

There is some reason to believe that industries with very simple price structures or those whose price structures had been formalized by means of gross price lists, cost manuals, or well established product classifications and trade practices, faced fewer problems in the operation of their price filing plans under the codes than did industries without such simplified or formalized price structures. This conclusion extends not only to the mechanical operation of the plans, but also to the publicity achieved.

The effectiveness of standardized price structures in facilitating control over the price structure of individual members of the industry depended, too, in large part upon the extent to which those structures represented a codification of customary methods of pricing as opposed to new methods not well assimilated in industry practice generally. A mandatory code requirement that prices be fixed differentials or extras be applied to a filed base price afforded an excellent frame work for controlling the structure of price lists and the relationship of the several component prices making up the price lists of individual filers. In many instances, however, the very circumstances involved in efforts to achieve standardization - e.g., excessive product differentiations, complex marketing structures - are circumstances unfavorable to successful price filing operations. Hence the failure of elaborate product classifications, customer classifications, etc., to achieve a high degree of control over the price structure in such industries is not surprising. Such failures indicate the greater difficulties of price control in such industries, difficulties which would appear even under mandatory price fixing regulations. In other industries in our sample, efforts at control of the price structure by means of such standardization of products, customer classes, terms and conditions of sale have been highly successful.

2. Product Classifications.

Industries which had already developed formal product classifications were successful in many instances in introducing the requirement that filed prices be expressed in terms of discounts from gross list prices. In other industries, price filing was a direct impetus to product classification. This did not necessarily or usually focus on quality standards, but rather on the classifying of products into identifiable groups

suitable to express price or cost differentials. The requirement (either by code or code authority) that such differentials be made uniform and mandatory was not unusual. (*)

Approximately one-third of the 57 industries included in the price filing sample attempted or accomplished some control over the price structure through the establishment of product classifications.

The form of control varied from a general classification or definition of the products of an industry to a complicated and comprehensive classification with the establishment of uniform extras and deductions to be applied to base prices. As an assisting device for price control, product classification was especially significant in the metal window industry, the steel castings manufacturing industry, the business furniture manufacturing industry, and the gas appliances and apparatus industry.

a. Metal Window Industry.

The gross price list adopted by the Metal Window Institute under trade practice conference procedure of the Federal Trade Commission in 1929 and revised on later occasions was incorporated by reference in the code for the metal window industry, to be followed uniformly by all members of the industry. (**) The price filing plan required only the filing of quantity and installation discounts from this gross price list. The gross price list included standard specifications for industry products and fixed differentials for classes of trade, special finishes, special non-standardized products and other terms and conditions of sale.

The "Gross List Prices" represented an extensive compilation of the base list prices for the "Standard" and "Special" products of the industry, with the inclusion of "Standard List Extras" and "Special List Extras" to permit the determination of a list price for any required product. (***)

In the furtherance of its control over the price structure through a system of product classification, the code authority adopted a resolution requiring an industry member to secure the permission of the

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(*) E.g., business furniture, Paper and Pulp Manufacturing Code, envelope industry, tag manufacturing, metal window, steel castings.

(**) Section 1, Article VIII, Code of Fair Competition for the Metal Window Industry.

(***) Gross List Prices, dated August 1, 1933, issued by Metal Window Institute, p. 100, (In NRA Files, Metal Window Industry Code)

commissioner of the code authority in order to depart from the "Gross Price Lists" in quoting prices on a project involving the use of industry products in excess of "limiting sizes". The commissioner in such cases was to furnish the industry member with the basis for estimating the list prices for the special requirements in question. (*)

The individual member was not privileged to establish his product classifications under the Metal Window Industry Code, nor was he privileged to vary the price relations between products. His discretion in filing was limited to the filing of discounts.

The importance attached to such product standardization is indicated by the desire of the code authority to stay price filing on a group of products not covered by the gross price lists. Standardization had not been accomplished for non-ferrous window products prior to the Code. The difficulties of price filing in this Division led to a resolution by the code authority on January 23, 1934, requesting that members be relieved from filing prices on these products, until such time as the coordination committee could study the non-ferrous products, and through cooperation with all producing manufacturers establish a practicable, general standardization of such products on a basis similar to that then in effect for all steel products. This was sought in order that there might be "some basis upon which discounts to the trade may be intelligently established". (**)

b. Steel Castings Industry.

The steel castings industry is an excellent example of an industry that established such a formalized product classification just prior to the code and utilized it in connection with the price filing plan. (***) The price filing provision of this code was permissive, with the agency of the sub-division or product classification empowered to establish price filing. It stated only that after it had been determined to establish price filing each member manufacturing products within such sub-division or product classification "...shall within ten days after notice... ...file with the agency a price list...showing its current prices, and the agency shall immediately send copies thereof to all members of the industry engaged in the manufacture of such specified product." A ten day waiting period was provided for revision. Adherence to these price lists was also a matter for decision of the agency of the sub-division or product classification concerned. The code provided that if the agency so desired "no member of the industry within such sub-division

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(*) See Rule Book, supra, p. 22.
(**) "Metal Window Industry Rule Book", p. 1. In NRA files, metal window industry.
(***) See Appendix B.

or product classification shall sell directly or indirectly by any means whatsoever, any product of the industry included within a sub-division or product classification ... at a price less than the price shown for such product in the list filed by such member."

There is no mention in this price filing article of any industry price list or other limitation on the freedom of individuals to quote their prices according to any method they chose. The Steel Castings Industry Code designated the board of directors of the Steel founders' Society as the general agency for the administration of the code and empowered the board to "make such rules and regulations subject to the approval of the Administration as may be necessary for the Administration and enforcement of this Code." (*)

On February 13, 1934, the Code authority adopted Commercial Resolution No. 16, which made it mandatory for members to file prices on the basis of schedule letters representing a comprehensive system of product classification. The development of these schedules as a measure for regularizing the price structure in the industry had followed a series of experiments with price filing and cost work. (**)

The Steel Founders' Society had engaged in price filing activities under an old Eddy Association some twenty years before, in which individual reports were collected and circulated back to members. This plan was abandoned after the decision in the Hardwood Distillation and Linseed Oil cases. It was followed later by a plan for exchange of data on past transactions. These "closed business reports" were likewise discontinued in 1924. Other intermittent efforts at exchange of prices took place at one time or another but were abandoned because the members were not sufficiently interested to participate. The efforts of the Society were apparently turned toward cost studies and exchange of cost information. In March 1923 a book of "notification blanks" based on the last published prices of the American Steel Founders were circulated to members of the Steel Founders' Society. Members were later asked to report on the quotations and orders for the apparent purpose of showing deviations from the notification levels that had been sent out. The price level notification was abandoned in April, 1924, because it was not very generally used by members. This background of early experience of price filing and cost studies (***) explains in part the methods used by the Steel Founders' Society in setting up the price filing methods in the industry after the code was approved. On the basis of cost determination schedules, made up in 1926, the institute set up an elaborate classification of products according to their industrial use and devised a master

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(*) Section 1, Article V, Code of Fair Competition for the Steel Castings Industry.

(**) See Appendix B, p. 589 ff.

(***) Information taken from the Federal Trade Commission's report "Open Price Trade Associations", page 337. The association at that time consisted of only 49 members, constituting about 22% of the concerns in the manufacture of steel castings.

schedule for gross price lists on the basis of these classifications. Some eighteen price schedules were designed to furnish means for a ready calculation of the list price on a weight and number of pieces basis, and, as an initial suggestion, the known 600 classifications of products were assigned to the various schedules on a basis of their relative costs. These schedules were identified by letters ("A", "B", "C" etc.) and individual founders were urged to file the desired schedule merely by indicating the pertinent letter. Later, by means of commercial resolutions, the code authority for the industry made it mandatory to file on the basis of these established schedules, although members were still free to indicate the particular schedule to be applied. This mandatory requirement was disapproved by some of the advisory boards, but no action was taken by NRA to forbid the ruling.

While standardizing the products and the extras for weight and number of pieces, the code authority also found it necessary to set up a classification committee to review the new classifications submitted by members. On May 7, 1934, the code authority adopted Resolution No. 22 which provided for a committee on definitions and classifications to serve and to meet at least once each quarter for the purpose of reviewing all steel castings classifications filed by members of the industry.(*) This committee had power to disallow such classifications as in the judgment of the committee, after due consideration of all facts presented by the member of the industry filing such prices, were either duplications of pre-existing approved classifications or not properly definitive.

It was further resolved that such committee might require members of the industry to define new classifications and might formulate definitions to apply to any classification filed, such definition to be controlling in case of disputes regarding improper classification of castings for pricing purposes. It was also resolved that no new classifications should be accepted, published, or used as the basis for making quotations until they had been approved by the committee on definitions and classifications. (**)

c. Business Furniture Industry

The code committees of the steel shelving and other divisions of the business furniture industry were granted the power under the code to establish the minimum additions to and the maximum deductions from the base prices of the various lines of the industry product. (***) On May 11, 1934, the code committee approved a list, recommended by the industry's planning & classification board, of uniform extras and deductions, comprising 38 pages, to be added to or deducted from the base prices of fourteen standard products.

The legality of the exercise of this power by the code committee was questionable in that the uniform extras and differentials were to

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(*) See Appendix B, pp. 583-607.
(**) Ibid.,
(***) Article VIII, of Exibit C, Divisional Supplemental Code for Steel Shelving Industry, Code Fair Competition for the Business Furniture, Storage Equipment and Filing Supply Industry Code.

be based on the direct cost thereof and no cost accounting system had been approved.

d. Gas Appliances and Apparatus Industry

The Gas Range Institute members, who operated under the Gas Appliances and Apparatus Industry Code, on November 19 and 20, 1934, at a meeting attended by representatives of over 90% of the gas range production agreed to a product classification and to a minimum price plan which was designed to afford a complete price control. The following excerpts from the minutes of the meeting present a detailed picture of the nature of this agreement. (*)

"Three Levels of Base Costs

There was a unanimous agreement reached that the confidential agency should use three cost levels, which are as follows:

1. Exclusive metropolitan New York and Philadelphia low market base for the apartment house trade.

2. The Cleveland base for the average quality range.

3. The Detroit base for standard quality ranges.

"Metropolitan Low Market Base Cost.

It was agreed that a total manufacturing and selling cost of not less than $27.50 be applied to both the console range and the table top range manufactured exclusively for the metropolitan apartment house trade in New York and Philadelphia territory. This is subject to either (1) a deduction of $1.00 for manufacturers selling direct who are not national advertisers, or (2) a discount of not more than 20% to jobbers and public utilities. This means that under no circumstances will the costs of the manufacturer to the apartment house or building trade with respect to direct sales be less than $27.50, with the exception of the $1.00 differential above specified. It was agreed that the minimum base cost in any case would not be less than $22.00.

"The following specifications apply to both the console and table top range;

1. 36" in length (end shelf and heat regulator not included in measurement).

2. Oven size: 16" wide.

3. Full porcelain outertrim with japan cast frames when used in constructions.

(*) Bulletin, dated November 23, 1934, issued by the Gas Appliances Institute (In NRA files, Gas Appliance and Apparatus Code, Volume A, part 2)

4. Stipple or mottle enameled oven and broiler linings.

5. Japan grates and Burners.

6. Enamel burner box linings or bowls.

7. Semi-insulation --- Oven top and two front doors of oven and broiler.

8. Any kind top burner lighter.

9. Storage drawer type.

10. Drop door conventional broiler (not pull-out).

"Any additions to or deductions from the above specifications should be figured in accordance with the Cleveland base.

"It was further agreed that advancing costs would necessitate a 5% increase over this base before or by December 15th, 1934.

"This establishes a minimum cost of $28.88, after December 15th, 1934, subject to either (1) a deduction of $1.00 for manufacturers selling direct who are not national advertisers, or (2) a discount of not more than 20% to jobbers and public utilities. This means that under no circumstances will the costs of the manufacturer to the apartment house or building trade with respect to direct sales be less than $28.88, with the exception of the $1.00 differential above specified. Thus, the minimum base cost in any case after December 15th will be not less than $23.10.

"A permanent committee was appointed for the purpose of holding semi-monthly meetings with reference to this metropolitan New York and Philadelphia Low Market Base.

"The Cleveland Base

"The Cleveland base is for a full enamel range and represents the costs of employers who manufacture for average markets. It does not include the manufacturers under the Detroit base. The base cost was agreed to be $22.00 for a console and $23.25 for a table top. The specifications for both the console and table top stripped ranges are identical to those above illustrated for the Metropolitan New York and Philadelphia Low Market Base, with the following additions and deductions:

1. Add 50¢ per inch-body measurement - over 36".

2. Add 50¢ per set for enamel grates.

3. Add 50¢ per set for enamel or alloy burners.

4. Add 75¢ for loose enamel lift cover.

5. Add $1.35 for lift hinged cover or attached.

6. Add 75¢ for pull-out broiler.

7. Add 75¢ for raise or lowering broiler.

8. Add 37½¢ each for Duplex or Harper burners.

9. Add $4.00 for any type over heat control.

10. Add 25¢ per side and back for insulation.

11. Deduct 25¢ each for one piece swing storage compartment of oven and broiler combined door.

12. Electric lights including brackets and cord--clocks--condiments, etc., shall be added at cost plus 20%.

"These costs are the extreme low and can apply only to goods of second quality. Costs must be graduated upward in accordance with the quality of the merchandise. The standard quality manufacturers subject to the Detroit base agree that their costs are at least 12½% over these Cleveland base costs.

"It was further agreed that advancing costs would necessitate a 5% increase over this base before or by December 15th, 1934. Thus, the Cleveland base, effective not later than December 15th, 1934, will be the following:

Average quality full enamel console	$23.10
Full enamel average table top range	24.41

All costs F.O.B. factory."

"The Detroit Base.

"The Detroit base was reaffirmed by the manufacturers of standard quality ranges. Thus, the base costs were agreed to be $39.00 for a console range and $43.50 for a table top range, with the following specifications:

Detroit Base Console Range Specifications.

1. 40" in length (end shelf and heat regulator not included in measurement).
2. Oven size: 16" wide by 14" high.
3. Japanned grates and japanned burners.
4. Drop door (conventional) broiler.
5. Any kind of top burner lighter.
6. Oven heat regulator
7. Full oven insulation

Detroit Base Console Range Additions and Deductions

1. Add or deduct $1.00 per inch over or under 40" in length.
2. Deduct 25¢ per inch for oven height under standard 14" height.
3. Add 50¢ for enameled grates.
4. Add 50¢ for enameled burners.
5. Add 75¢ for loose enameled cover over cooking top burners.
6. Add $1.50 for hinged or attached enameled cover over cooking top burners.
7. Add 50¢ for pull-out broiler.
8. Add $1.00 for raising and lowering mechanism in broiler.
9. Add 37½¢ each for duplex (harper type) burner.
10. Deduct not more than $8.00 for heat control.
11. Deduct 63-1/3¢ for less insulation in each body side.
12. Deduct 63-1/3¢ for less insulation in body back.
13. Deduct 30¢ for less insulation in oven top.
14. Add $2.50 for electric light (including bracket and cord)
15. Add 20¢ per piece for condiment set.

Detroit Base Table Top Range Specifications

"The specifications of the standard table top range are identical to the standard console range as stated above with the following exceptions:

1. Any kind of cover top over cooking top burners, and

2. Two service drawers or equivalent service compartment.

Detroit Base Table Top Range Additions and Deductions.

"Same as for console range except no extras need to be added for enameled cover over cooking top burners, the cover top being regular equipment on table top ranges. The 30¢ deduction for less insulation in oven top on console ranges does not apply to table top ranges.

"The above additions and deductions apply only to the qualities of the Detroit base, and are not to be used in computing the Cleveland base which applies only to ranges of average quality. Any manufacturer claiming the 'average' quality differential of 12½% should use the Cleveland base.

"The costs for both console and table top ranges are computed F.O.B. factory.

"No additions or deductions specified in the Cleveland base can be applied to ranges under the Detroit base or to the promotional number.

"It is further agreed that advancing costs would necessitate a 5% increase over this base before or by December 15th, 1934. Thus, the Detroit base, effective not later than December 15th, 1934, will be the following:

Standard quality console ranges	$40.95
Standard quality table top range	45.68

"Filed Prices

"The Gas Appliances and Apparatus Industry Code requires all selling prices to be filed with a certificate that they are all above costs. Your immediate attention is directed to the necessty of filing new prices in line with the costs which have been illustrated above."

In summary it may be said that in the metal window industry product classification served to make possible the establishment of a gross price list setting forth list prices to be followed by all members of the industry in filing. Price freedom was limited in the main to changing of quantity discounts. In the steel castings industry, price filing on a complexity of products was facilitated by an initial classification of products by the industry agency and by a close control over the manner in which members classified new products. This scheme of classification was supplemented by various schedules of net price differentials for quantity (number and weight) purchases which the agency applied to the various product classifications. These net price schedules for the various product classifications in turn were suggested for adoption by industry members. The business furniture agency controlled price filing on a variety of products by establishing uniform extras and deductions from base prices on standard products, to be used

in determining the prices of unstandardized products, which were, in turn, listed and defined by it. The Gas Range Institute, in the administration of the price filing plan, attempted to fix prices for base products which it defined and in addition to apply additions and deductions for products which varied in some particular from these basic ones.

In each of the above cases product classification was established as a part of the price filing plan and was used as a basis for determining for, or suggesting to, the industry member prices to be filed on the various products which he made.

3 - Customer Classification

a. Introduction

Some kind of classification of customers is implicit in any price filing plan if it is assumed that publicity is not expected to destroy the prevailing practice of selling products at varying prices according to the quantity purchased, the geographic location, or the trade status of customers. The grouping of customers is primarily for the purpose of setting up price differentials, which are reflected in filed prices. Theoretically these price differentials are based on the relative cost of serving the different classes or on the relative advantage to the seller of disposing of his products to a particular class - an advantage usually arising because of services that may be rendered in the distribution of the goods to the ultimate consumer (*).

The term "customer classification" has ordinarily been reserved, in NRA discussions and elsewhere, for the grouping of customers according to trade status, rather than according to size of purchase or of location, and for a formal, organized classification rather than the independent flexible groupings adopted by individual sellers. Customer classification may consist in the listing of those classes of customers to which members may sell, either with or without the definition of these classes; or it may extend to the placing of individual buyers into the classification established. N.R.A. policy, as expressed in Office Memorandum 267, issued July 20, 1934, declared against provisions in codes establishing or permitting the establishment of mandatory customer classifications. Suggested classifications could be prepared, and approved by NRA, but there was to be reserved to each member the right at all times to classify his own customers in accordance with his own judgment. Coercion or influence to limit this freedom or to bring about uniform or stipulated prices, discounts or differentials, was prohibited, as were suggested classifications leading to resale price maintenance or discrimination against any customer or class of customers. (**)

It was in part because the prevalence of uneconomic discrimination was recognized that Office Memorandum No. 267, which permitted suggestive customer classifications, was promulgated. On the other hand, the extreme difficulties of determining and measuring the cost of serving various classes of customers or the value of the services rendered by these groups on the one side, and rigidifying the distribution structure and of discriminating against certain individual concerns and classes of customers on the other, led the Administration to avoid the responsibility of approving binding classifications, under any circumstances.(***) The policy statement represented an admission that price publicity in itself would not in many instances end uneconomic discrimination (****)

(*) Quantity differentials may be used instead of functional trade discounts, or be calculated roughly to recognize differences in service, or they may exist concurrently with them.

(**) See Appendix C, Exhibit V, for Office Memorandum 267.

(***) Interview with C. A. Pearce, who participated in the discussion preceding the formulation of this policy statement.

(****) See Chapter II, above, pages 64-66.

and that such publicity might be helpfully supplemented by positive controls, if it were possible to formulate them with necessary safeguards. The device of suggestive or educational classification which was approved represented a compromise between acceptance of the urgent need for positive controls over discrimination and conviction that it was impossible for an agency such as the NRA to measure this discrimination precisely enough to justify the mandatory control of one of the most significant elements of competitors' pricing policies. (*)

This policy announcement, however, caused numerous protests which served to focus attention on another intimate relationship between price filing and customer classification as mutually dependent measures for promoting price publicity, viz.,

> That the requirement that members adhere strictly to prices as filed is difficult of enforcement without some accepted uniform definition of customer classes, since sellers can violate the requirement by giving a favored buyer an indirect price concession at any time simply through shifting him into a customer class for which he did not normally qualify, or by creating a new customer class and filing whatever price he wished to apply to it. (**)

It is this point which raises the issue pointed out in other connections and illustrated further below and which was prevalent in connection with most price filing plans under NRA codes, namely, that price publicity may depend for its effectiveness precisely upon the establishing of controls over, or the regularization of, those elements of pricing policies which are subject to manipulation to avoid or evade the requirement established; but restrictions of any of the elements of pricing policies may represent to that extent restriction of competitive pricing and, moreover, may represent that one element of stabilization that is necessary to perfect a complete pattern of control over price competition. It was this objective rather than full and effective price publicity in which codified industries were often interested. Attempts, for example, to stabilize the price structure by minimum prices, uniform trade discounts and other terms and conditions of sale, either by code provisions or extra-legally, called obviously for customer classification to prevent evasion. In other cases, customer classifications were more directly the tool of certain groups within an industry to preserve or otherwise make more secure their own methods of distribution or marketing.

(*) Even so it may be noted, by accepting the responsibility of approving non-mandatory classifications the Administration presumably did not avoid the difficulties of determining classification of customers along lines of cost serving or functions performed. The fact that Office Memorandum No. 267 was embraced in only a few instances by industry perhaps prevented this issue from coming to the foreground.

(**) See in this connection Chapter III, page 132 ff.

Whatever the immediate or ultimate objectives of the industry in establishing partial or complete customer classifications or devices with similar effects, price filing plans served as a logical and ready means for establishing these controls--in some cases by their incorporation in the plan itself and in others by rulings made informally pursuant to the administration of the plans. In both cases, price filing had, of course, the supplementary function of checking the compliance of members with the classifications established. In other instances, price filing served primarily in a policing function, i.e., by checking the conformance of members in adhering to classification standards established by other code provisions or by dominant members of the group. As an aid to the policing function of price filing, it was frequently provided that members file the definitions of customer classes used or the names of specific buyers classed under the general groupings established. Many illustrations are available of the use of price filing under NRA codes in connection with customer classification or similar devices. No attempt is made in presenting the cases which follow to classify them according to the objectives which their proponents may have had in mind--whether primarily to promote more effective publicity through eliminating avenues of evasion or to promote a scheme of more effective price control or stabilization or to protect or otherwise make more secure certain methods of distribution. In many instances it is not possible to state the objectives; in other instances they may be clear.

b. Illustrations of the Use of Price Filing Plans in Connection with Customer Classifications

The Lime Code provided that no builders' supply dealer or agricultural dealer should be classified as an agent for agricultural, industrial or chemical lime, or as a jobber for building lime in the trading area in which he operates as a retail dealer, unless approved by the district control committee involved. This requirement was meant not only to prevent evasion of the price filing requirements by misclassification but also as part of a program of control over resale prices. The issuance of Office Memorandum No. 267 resulted in a stay of this provision pending further consideration of policy. The Code History, however, reports that customer classification was discussed at almost every meeting of the code authority and that vague, indefinite and improper classifications were common and interfered greatly with the workings of the open price policy. (*)

The farm equipment industry required each manufacturer to submit a list of jobbers with whom he did business in order that "an accurate list of jobbers" could be obtained. These jobbers were then required (by the code) to file prices to dealers. Any manufacturer selling to other persons at jobber discounts would be violating the code.

The proposed revised code for the paper and pulp industry, presented at Public Hearing, June 29, 1934, would have included extensive controls over distributors, including the filing of the names and status of all persons granted distributors' discounts and allowances. (**)

(*) Page 109 a.
(**) Transcript of Hearing, NRA files

The asbestos industry required the filing of all accounts, except dealers, to be kept confidential in case of dispute or upon request of a member as to the classification of a particular buyer by another member. It was also proposed to compile a list of jobbers to be recognized by the members but it was feared that non-members of the association, including affiliates, would not observe the list.

The Gas Appliance and Apparatus Industry Code, Article IX, suggested that sales prices and terms "may provide reasonable differences as to (a) export sales, (b) sales to large purchasers, (c) sales to wholesalers, jobbers and brokers, (d) sales to retailers, and (e) direct sales to consumers." (*) It provided further that "published sales prices and terms of any employers applicable to one class are not applicable to any other class, and if so used shall be a violation of that code."

This code provision was amplified by code authority action in Rule 7, established December 4, 1933, providing that sales prices and terms for gas water heaters should be classified as:

(a) Export sales
(b) Sales to utilities
Sales to jobbers
Sales to mail order houses
Direct to you sales
(c) Sales to plumbers
(d) Sales to consumers.

Later extra-legal attempts were made to impose fixed discounts on different classes of trade. (**)

Article X, Section 2 of the Mayonnaise Code, provides specifically that "every member of the Industry must classify buyers upon a reasonable basis---but all discounts shall be uniform to all trade buyers of the same class for products of the same grade and quality and must be published."

Apparently the code authority felt that this provision was outweighed by Article X, Sec. 6, which provided that no members of the industry should offer or make a distribution service price unless it was a genuine distribution service price; and defined such a genuine price to mean a price differential which was based upon and reasonably measured by a substantial difference in the distribution service rendered.

Whatever the supposed authority for the action, the code authority evidently did establish a classification to be followed, for on May 23, 1934,(the code was approved on March 21, 1934) official bulletin No. 3 indicated their ruling concerning the proper classification of syndicate

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(*) Codes of Fair Competition, as approved. Government Printing Office, Vol. III, Page 429.

(**) The account of that action is contained in "Price Filing in Gas Appliances Industry", S. McKittrick; (in NRA files).

stores. (*) This read in part:

> "There has been referred to the Code Authority the matter of classification of syndicate stores to be followed by members of the Industry in filing their schedules of prices and discounts and in making their sales to such stores. Such syndicate stores include such companies as F. W. Woolworth and Company, McCrory, Kresge, etc., and other establishments of similar nature, who do not operate their own wholesale warehouse but which buy direct from manufacturers for direct shipment by the manufacturer to the individual stores. It is the official opinion of the code authority that such companies must be classified as retailers and that they may not be classified as wholesalers. Therefore, in selling to such stores, your sales must be at retail prices..."

Difficulties were experienced in enforcing such trade classifications in this industry and various attempts were made by the code authority to urge manufacturers to take action to reduce discounts that might result in price cutting in the secondary market.

In code authority release No. 14, dated August 23, 1934, Mr. W. F. L. Tuttle, the code authority secretary, wrote to the members of the industry:

> "... <u>if a wholesale distributor consistently gives away to the retailers a large portion of its distribution service discount, this is prima facie evidence that the discount allowed the wholesaler by the manufacturer is excessive and not genuine. Therefore, in such cases, the manufacturer would be and is obliged to reduce the discount allowed to such wholesale buyers.</u>"
> (Underlining by Mr. Tuttle)
>
> "In order that the meaning of this bulletin shall be very clear, let us emphasize that a cash and carry wholesaler is not entitled to the same distribution service discount that a service wholesaler receives..."
>
> "Another apparent violation of this code would be where a chain store purchases quarts Salad Dressing at $2.90, less 15%, and sells to the consumer at this figure or less. In such an instance, the chain store would be giving away all of its distribution service discount because it would have added no mark-up to cover its retail costs. Therefore, the distribution service discount would be an excessive one."

(*) In NRA files

Mr. Tuttle goes on to say that until this code provision (and apparently, the rules he had clustered around it) was complied with,

> "...there can be little stability in this industry and manufacturers of private label and branded merchandise would not be able to protect their own full-service wholesalers against the price cutting methods of other non-service wholesale buyers..."

On January 24, and again on March 22, 1935, Mr. Tuttle wrote to manufacturers on this subject, referring particularly to chain stores, large independent retailers and cut-price wholesalers as those improperly receiving and utilizing excessive distribution service discounts or prices. (*)

The asphalt shingle and roofing industry provided for the filing with the code authority of the qualifications set by individual members for determining the prices, terms, and conditions of sale made applicable by them to the different classes of trade. The names and locations of their customers were likewise to be filed, grouped according to their stated qualifications. These names, with their ratings, were to be made available to the trade and to industry members without disclosing the name of the manufacturer submitting them (except to the extent necessary to prevent violations). This provision effectively disclosed and prevented any evasion of filed prices by secret shifts of classification, while ostensibly preserving the freedom of individual manufacturers to classify their customers as they wished and to change their trade qualifications at any time. Actually the provision led to close regulation and a uniform customer classification enforced by supervision through "Mis-Classification" meetings held at periodic intervals under the auspices of the code authority. These meetings were unauthorized by the code and their discontinuance was ordered by the NRA at one time (**)

The valve and fittings industry code contained definitions both os markets and of classes of trade factors, and provided in Article IV, Section 1, on "Published Price Policy", that:

> "members should file their prices to each of the trade factors defined in Article II, provided that the lowest prices that may be filed shall be the prices at which he shall sell his products to his distributors."

The primary market was defined as that in which a distributor purchases from a member of the industry, a secondary market as one which may be served by a distributor.

The code, as first proposed, contained a provision permitting the code authority to establish differentials in price between various types of buyers. This was not approved, but a provision was submitted

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(*) See pp. for later proposal to amend code to bind distributors to resale price maintenance contracts.

(**) For details, see Report of asphalt shingle and roofing industry, Appendix A, pp. 544-546.

authorizing a market sudy to determine the basis for fixed differentials. No recommendations were ever made. The short-line producers in the industry opposed fixed differentials on the ground that they would provide price uniformity, detrimental to the opponents because jobbers preferred to obtain a full line from one producer if prices were equal.

Without approval of mandatory differentials, the industry attempted to encourage the existing follow-the-leader tendency to utilize the Crane Company list with appropriate discounts to the various trade factors. A proposed mandatory price filing form, including a further breakdown of customer classes than was provided in the code, with rigid definitions of these classes, and a specific reference to the Crane Company list, was disapproved by the NRA. The attempt to establish fixed differentials and control over the sales in the secondary (distributor) market had been accompanied in the early code proposals by a definite resale price maintenance policy. This was likewise opposed by short-line manufacturers because it did not limit direct sellers (usually the full-line manufacturers) from lowering prices to the consumers, and was omitted from the code as approved. Later, movements were made to develop a plan for resale price maintenance contracts to bind distributors to filed prices, but this plan was not submitted for approval before the end of code operations. (*)

The envelope industry illustrates clearly the informal activities of code authorities in setting up customer classifications in connection with the administration of the price filing plan. The lack of definiteness of one provision in this code opened the door for this activity. Article VII, Paragraph 4 of the code reads:

> "...All such schedules (filed) shall be in such form as the code authority shall prescribe...."

The code authority apparently took this as a basis for issuing mandatory customer classifications. Such classifications were the source of considerable complaint from customers; but the office of the assistant deputy administrator was inclined not to take action concerning these complaints (**) although the Legal Division, the Research and Planning Division and the Consumers' Advisory Board expressed dissatisfaction with the manner in which the price filing plan was operating and in particular with the action of the code authority in imposing customer classifications through price filing forms. (***)

As a result of the issuance of Office Memorandum No. 267, the industry found that it had less compliance with the classifications established by the code authority; and partly because of this failure, on April 25, 1935, the code authority voted to suspend the open price plan. Because of the imminence of new legislation at that time, the

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(*) See page 297 , For reference to this section see Report on Valve and Fittings Industry, prepared by Marvin L. Shirley, Distribution Relations Unit.

(**) See memorandum from Asst. Deputy Admin. G. K. Hamill, to W. J. Brown, Deputy Administrator, April 15, 1935, in NRA files envelope industry.

(***) See memoranda to Asst.Deputy Hamill from the Legal Division April 16,1935; from Research and Planning Division,March 28,1935, and from Consumers Advisory Board,Apr.23,1935.In NRA files, envelope industry.

office of the deputy administrator took no action on this decision by the code authority. (*)

The Wood Cased Lead Pencil Code as proposed provided in detail for terms and discounts to apply to types of customers, including dealers and consumers.(**) These were suspended in the Order of Approval, with the exception of cash discounts and credit terms. (***) The provisions were meant to stabilize prices by standardizing quantity and trade discounts, so that the "relative" prices to customers would be maintained even though the list prices to which they wer applied might be altered by the individual manufacturer under the price filing provision. The list price was defined as the price at which the manufacturer would sell one gross to the consumer. Quantity discounts were provided for direct sales to consumers, graduating upwards to a maximum of 33-1/3%. Minimum price schedules were also approved originally in the code but were suspended. Price filing was apparently intended in this code to serve as a purely checking device for adherence to established controls, for the failure of the NRA to allow these provisions to operate led the code authority to request the suspension of the price filing provisions.(****)

The Candy Manufacturing Code did not provide specific customer classifications but Section 1 of the open price article stipulated that all filed price lists should include all discounts and allowances, -- which should be uniform for all buyers of the same class under like terms and conditions in the same marketing area.

In order to effectuate this provision the code authority listed and described by functions the classes of buyers recognized in the industry, including wholesaler, wagon-jobber, independent retailer, chain store, syndicate store, concessionnaire, and vending machine operator. These classifications were released in Code Administration bulletin No. 1, entitled the Open Price Plan. Bulletin No. 2 further classified buyers as small chain store, medium chain store, large chain store, cooperative buyer, concessionnaire, and vending machine operator, with definitions. The independent retailer class was expanded to include the "variety store" and "the department store".

Difficulties with these classifications were constant. The code authority rejected a proposal to incorporate the provisions of Office Memorandum No. 267, on the grounds that it appeared not only to permit but to encourage discrimination in the price at which new merchandise is offered to the several classes of buyers. It was argued that the opportunity to quote an independent retailer as a large chain store, or to quote him the same price or prices, actually fostered discrimination.

(*) Code History for the Envelope Industry, page 9 - 10

(**) Codes of Fair Competition, as approved. Government Printing Office, Vol. VII, P. 109

(***) Ibid.

(****) Summary of Report on Wood Cased Lead Pencil, prepared by Distribution Relations Unit, Division of Review.

A few members of the industry insisted on filing prices to an additional class of buyers known as "supply jobbers", to whom they quoted a 25 per cent discount as compared with the "service jobber" quoted the usual 20 per cent discount. The code authority sought to obtain an interpretation of Art. VII, Sec. 1, quoted above, which would have compelled manufacturers to "justify" their classification. The Code History reports that this interpretation could not be handed down because of policy limitations, but contained the further observation that: "It must be recognized that the code provision is impossible of enforcement if members are left free to set up artificial classifications of customers and to classify customers artificially."

code authority action to handle the situation was reported in the minutes of the meeting of September 30, 1934. (*) A telegram was read from one of the field men of the code authority stating that a manufacturer had filed prices with Dun & Bradstreet, Inc., allowing an extra five per cent trade discount to 'supply jobbers' sometimes called 'supply houses' and in some territories known as 'sub-jobbers'. It was stated that members of this industry were permitted to classify buyers according to their own judgment, but that if any classification was adopted other than those defined by the code authority, the manufacturer (member of the industry) might justify the classification by defining it specifically when filing his price list. If the definition submitted did not definitely create a different class of buyers than those defined by code authority, the manufacturer filing such prices had violated the code in that his prices were not 'uniform for all buyers of the same class under like terms and conditions in the same marketing area.' The minutes then state:

> "In the opinion of the code authority the so-called supply jobbers (supply houses or sub-jobbers) in fact do not perform functions other than those applied to jobbers as defined by the Code Authority. Motion by Mr. Voneiff seconded by Mr. Bunte that the code authority instruct the Managing Director to notify members of the industry or at his discretion to instruct Dun & Bradstreet to notify members of the industry that in all such cases they must be governed by the fact stated above. Motion carried." (**)

This action was tantamount to enforcing a mandatory customary classification, in that the Code authority was made the sole judge of a proper classification.

One instance will suffice to show the influence of provisions designed to prevent discrimination in leading to control over customer classes and the prices filed to the several classes.

(*) Code History, Candy Manufacturing Industry, op. cit.
(**) Minutes of the meeting of the code authority for the Candy Manufacturing Industry, September 30, 1934, in NRA files.

Article VII, Section 9 of the Fire Extinguishing Appliance Code forbade "Discrimination in prices or terms of sale between purchasers of the same class, whether by misclassification or otherwise." These trade classes were to be defined by the code authority with standard differentials to be fixed by that body, subject to approval of the administrator. Such approval was never given, but the code authority on its own responsibility classed manufacturers as in grade A or B according to the size of the sales organization and the extent to which they supplemented their line with products from other manufacturers, and defined distributors, jobbers, very large users, dealers, general consumers, and government agencies. These definitions were naturally arbitrary in character. For example, "very large users" were not defined by quantity but as specific types of purchasers, municipalities of 250,000, utilities, transportation agencies, chains, etc. Mail order houses were included under the jobber classification. Distributors were to act as manufacturers' branch houses under contract and were (by code authority ruling) to be limited to 85 per manufacturer, nor more than 6 in any one state. (*)

A hearing to consider these rulings was held on April 30, 1934, and was followed by NRA disapproval of the classifications on June 7, 1934. Nevertheless, they were adhered to in large part by association members. Evidence indicates that the code authority attempted throughout to enforce its classification and differentials. The alleged basis for such attempts was found in the anti-discrimination clause cited above. Bulletin No. 7, entitled Discrimination between Purchasers, stated "It is clearly the intent of the Code of Fair Competition of the F.E.A.I. that all members of the industry shall operate on a uniform basis with respect to classification of customers and thus conform with Section 9, Article VII of the Code."

The Research and Planning code administration study of the rubber manufacturing industry contains a detailed account of customer classification and its relation to price filing in that industry. This statement of the experience in that industry merits quoting in detail:

> "....Four of the nine Divisional Codes (in the Rubber Manufacturing Industry) namely, the Flooring, the Rubber Footwear, the Heel and Sole, and the Mechanical Rubber Goods Divisions, provide for mandatory customer classification, but are effective in only two Division, viz., Flooring and Mechanical Rubber Goods.
>
> "For the Flooring Division, definitions of classes of customers are set forth in the Code but for the other Divisions, the Code Authorities are authorized to submit to the Administration recommended definitions of customer classifications. The Code Authority of the Footwear Division has never submitted for Administrative approval group customer classifications. This condition was brought about by the fact that the price filing

(*) For references see Bulletins 11 and 25, Fire Extinguishing Appliance Code Authority, NRA files.

provisions are not in effect. Customer classifications for the Heel and Sole Division were approved by Administrative Order No. 156-43, November 2, 1934. But, inasmuch as the open price filing provisions in this Division were stayed on February 1, 1935, the customer classifications are inoperative.

"Customer classifications for the Mechanical Rubber Goods Division were approved by Administrative Order No. 156-36, October 2, 1934.

"The customer classification definitions, as recommended by the Code Authority were contrary to policy and, to overcome the objections of the Legal and Research Divisions, the following paragraph was inserted in the definitions.

"'Nothing contained in these definitions is to be construed as prohibiting the official filing of different prices for customers in any class and of different prices as between classes of trade based on differences in cost and on services rendered or on quantities purchased.'

"Soon after Office Memorandum No. 267 was issued, stating that it was against the policy of the Administration to approve codes with mandatory classifications, a member of the Mechanical Division wrote directly to President Roosevelt protesting against this policy of eliminating price fixing. This letter stated that the various members after much effort and expense had established the rubber industry on a profitable basis and were just reaching the point where most companies were beginning to show a profit, and that the new policy of the Administration threw the price situation wide open and would naturally reflect on labor costs. The members could not understand, the letter continued, why more consideration was not given the matter before adopting the elimination of price fixing. The letter to the President was answered June 19, 1934, stating that the new policy applied only to Codes not yet approved.

"The Legal Division of the NRA had found it necessary to call the attention of the Deputy to actions of Code Authorities in relation to customer classifications which were illegal. On December 13, 1934, the Legal Division stated that practice of the Code Authority of the Mechanical Division as indicated by their circular letter No. MD 1436, by definitely fixing the classification of a named account was illegal because it prevented the flexibility upon which the Administration approved the classifications.....

"In conclusion, the evidence indicated that customer classifications are desired by Industry only when there is an effective open price filing system, and, as soon as open price filing becomes inoperative, customer classifications are ineffective. This was illustrated by the Footwear Divisions which declined to submit to the Administration recommended classifications after their open price filing systems became inoperative.

Likewise, in the Heel and Sole Division, after the suspension of open price filing, customer classifications became meaningless." (*)

The minutes of the meeting of the Divisional Code Authority for the Mechanical Rubber Goods Industry, held on March 30, 1934, amplify one of the points mentioned in the Research and Planning Division report. At this meeting the divisional code authority was informed that the flat belt group, molded hose group, and the miscellaneous hose group, members of the mechanical rubber goods sub-division, had passed a resolution to the effect that members of these groups would refrain from quoting "distributors" on a "distributors" price basis without having first secured the divisional code authority's approval of the classification of the given account as a "distributor". The divisional code authority, by formal motion duly adopted, approved such a procedure.(**) Clearly in this instance permissive customer classifications were so utilized as to be made mandatory.

Another instance of arbitrary action against a certain type of customers is evidenced in the case of the Code for the Business Furniture Industry.

The customer classification in this code was mandatory. Recommendations on problems concerning the classification of specific customers were made by a "Planning and Classification Board." Various interpretations were made by this board. Concerning these interpretations, the Research and Planning Code Administration Study for this industry says: "...persons not regularly engaged in the resale of industry products, including architects, equipment engineers, and contractors are (classified as) consumers and not brokers or dealers and must be sold on a one-order-one-delivery basis;....any purchasing agency that is organized by consumers to buy at less than retail prices shall be regarded as a consumer. Changes in customer classification and discounts granted thereby (relate to) institutions of learning, college book stores, and various state purchasing departments. There is little doubt that it has caused a reclassification of many buyers as contrasted with their pre-code classification. One example is that of very large consumer buyers, not for resale, who are lumped together with all other consumers. Several protests from large educational institutions and many states bear evidence to this fact. Another type of protest is that from equipment engineers who formerly sold some products but now are included as a consumer only, one such concern claiming that they had been put out of business because of the discount basis adopted..."(***)

(*) "The Administration of the Code for the Rubber Manufacturing Industry", NRA Research and Planning Division Code Administration Study, prepared by W. H. Cross, March 1935. Page 50-52. (This study in NRA files rubber manufacturing industry.)

(**) Minutes of Meeting of Divisional Code Authority, NRA files.

(***) "The Administration of the Code for the Business Furniture Industry", Research and Planning Code Administration Study Section, in NRA Research and Planning Library, pages 67-68.

Finally an example of the use of price filing plans or police conformance to standards established by dominant members may be given. In the carbon dioxide industry, there were numerous complaints that discriminatory prices for solid carbon dioxide (dry ice) were being filed and charged to purschasers owning 'converters' for reducing dry ice for use in carbonated beverages, etc. The prices charged to this class of customers were maintained at a level much higher than those for the product to purchasers using dry ice for packing ice cream and similar uses. The differential, which was substantial, was evidently maintained by means of the separate customer classifications and by economic pressure from dominant producers interested in preserving the market for liquid carbon dioxide and protecting the heavy investment in containers, which was threatened by any general increase in the use of dry ice in converters. The price filing mechanism was, of course, only a device in this control program. The code did not sanction mandatory customer classification, although the price filing forms issued by the code authority contained a suggested classification. But with dominant industry members intent on preserving the differential, the price filing system offered a convenient means for checking the behavior of those members of the industry or distributors inclined to reduce the differential and to sell solid carbon dioxide to converters on terms similar to those accorded other purchasers. (*)

(*) For complete account of attempted control in this situation by dominant producers, see Research and Planning Report, Price Filing and Customer Classification in the Carbon Dioxide Industry, Referring to this study, which was conducted by A.F. O'Donnell, of the Chemical Unit of the Code Administration Section of the Research and Planning Division, T. R. Snyder, Assistant Chief of the Code Administration Section said in a Memorandum dated May 29, 1935, "Due to the customer classifications practiced by this Industry, particularly discriminatory with reference to the use of dry ice in liquefiers or convertors, repeated allegations of monopoly had been made. This survey by Mr. O'Donnell included a field study in New York City for price filing and general information, together with an examination of the file in the Federal Trade Commission, the Department of Justice and the Securities and Exchange Commission on this subject...."

4. Geographic Price Arrangements.

In discussing the interrelationships between price filing and geographic pricing practices, it seems desirable to accept the general grouping devised in the report on "Control of Geographic Price Relations Under Codes of Fair Competition." (*) In this report these practices are classified as (1) those regulating the amount and incidence of transportation charges and (2) those which define the geographical areas in which certain phases of the price making process are regulated.

Within the first group fall those provisions requiring either f.o.b. or some form of delivered pricing and those regulating the nature and extent of freight allowances. Methods of delivered pricing include

(a) Prices varying in direct proportion with actual transportation charges
(b) Prices uniform for zones or for the whole country
(c) Prices with freight equalization permitted, usually with the most favorably located competitor
(d) Basing point delivered pricing

Practices regulating the price-making process within certain areas include (1) price filing zones (with certain limitations) and (2) anti-dumping zones, natural marketing areas, etc. These arrangements are usually accompanied by regulations regarding transportation allowances.(**)

A further distinction is made between practices which tend to sharpen price competition and thus to force price levels down, and those which tend to curb price competition and to facilitate price leadership and agreements as to price-fixing, production control and other controls. In the former group are placed freight allowances (coupled with either f.o.b. or delivered pricing), among them the frequently used practice of equalizing freight with more favorably located competitors. To the extent that freight allowances are regulated or systematized they acquire certain control characteristics. Anti-dumping zones and (tentatively) price filing zones are placed in the second category, as are all limitations on freight absorption, inflexible and controlled basing point systems, and uniform delivered prices for the whole country or for certain geographic zones. (***)

(*) Division of Review, NRA.

(**) See Preliminary Report, op. cit., pages 3-4 for descriptions of these types and the basis for the classification.

(***) F.o.b. mill pricing, flexible basing point systems and other forms of delivered pricing are given an intermediate and indeterminate position, dependent upon the circumstances of their application in particular instances. The basis for these classifications is fully set forth in the Preliminary Report, op cit., pages 3-12

Since this section is concerned with the control aspects of price-filing in relation to these geographic pricing devices, attention will be focussed on the extent to which price filing facilitates the operation of those practices which tend to restrict competition, and the extent to which price filing requirements have been used to secure the adoption of such practices in industries in which they were not formerly prevalent, or whose codes did not sanction them. One impact of control which may operate with respect to any of the practices listed above is the tendency of price filing (and of rules and regulations governing price filing) to encourage uniformity of price, and of the component elements of price. Such uniformity (if maintained by price filing, waiting period, no selling below cost, etc.) has been found useful as a means of tempering price competition, and of encouraging stability of prices at a profitable level. Hence uniformity in the amount of transportation charges as an element in price (as by systematic freight equalization), or uniformity in the practice of freight allowances, may contribute to a general program of price control and price uniformity, even if the particular geographic practice carried on in an unregulated manner would belong to the category of practices tending to further competition Any mandatory regulation of transportation terms in connection with price filing has, of course, the effect of adding one further element of inflexibility to the price structure. (*)

a. The filing of Prices on a Delivered Basis

The intent to equalize price competition by requiring uniform terms and conditions of sale is very apparent in price filing regulations. In the realm of transportation costs such equality can not be attained without some arrangement for the leveling out of differences in price arising from the locations of the different sellers with respect to the potential purchaser. Since the essential point of competition is at the point of delivery, these arrangements have led usually to delivered price systems or (what is the economic equivalent) to f.o.b. pricing, all freight allowed.

It has frequently been argued in connection with price filing, that the use of delivered prices simplified the filing procedure, and made prices more intelligible for customers who wished to compare with prices quoted by several companies, and were interested not in f.o.b. prices but in what the product cost on their own premises. Delivered pricing was further regarded as a useful means of preventing secret allowances in the form of transportation or freight, and hence the evasion of filed prices. (**)

It is apparent that delivered prices do simplify the price structure and thus contribute to ease of filing, and dissemination of filed prices. The argument that they facilitate comparison by a customer of the

(*) Cf. with section below, "Terms and Conditions of Sale" pp. 269-270.

(**) See in this connection Chapter III, above, page 138.

filed prices of several manufacturers is likewise true, in that they obviate the necessity of calculation and comparison of transportation terms. But if such terms can be clearly and completely filed the added convenience of delivered filing is hardly sufficient to outweigh other factors of consumer consideration. Delivered prices do not in many instances reveal the constituent elements of transportation and mill price and hence do not convey complete market information, particularly as to prices paid for the same product by other customers of the same class, located in different areas. Price discrimination between sales regions may easily exist under such pricing practices, and cannot be disclosed under many types of delivered price quotations. Even when the discrimination is apparent (as in uniform size differentials) it is perpetuated by the geographic pricing practice to which members adhere, and may destroy natural advantages of location that would exist for certain areas under different pricing practices. This "meeting of price competition" at the point of delivery is the main incentive to freight equalization and delivered prices. To the extent that the practices are systematically followed, they lead directly to uniformity of sellers' price quotations at any specific point. Publicity and the existence of a waiting period, of course, contribute to this end. Hence the filing of delivered prices (other than those based on actual transportation costs) is a distinct aid to complete uniformity of price quotations by sellers. While this uniformity is not of itself evidence of price control, if such prices are flexible to changes in cost, market conditions, etc., neither is the fact that delivered prices (e.g. basing point prices or uniform-zone prices) are immediately met when filed under an open price plan, evidence of competition. As the report of the Geographic Price Structure Unit indicates:

> " The question as to whether the formation of prices is competitive or controlled, relates exclusively to a stage of the process which precedes any filing or publishing of prices.
>
> " It is true that the existence of basing points facilitates price leadership, if such exists, but nothing ..... suggests that the institution of basing points alone can bring about price leadership or any other form of price control. There is a functional inter-relationship between basing points and measures tending to maintain high and stable prices, but no necessary sequence running from basing points as a cause, to price control as effect."
>
> "The essential and significant competition occurs in the formation of the price and in its responsiveness to changes in market and cost conditions, and has nothing to do with the fact that all producers must meet it, once it is set".(*)

(*) Preliminary Report, op. Cit., pp. 22-23, p. 65.

b. Price Filing and Basing Point Prices

Price filing was used in each of the four industries that had specific basing point provisions. It served to perfect the structure of price uniformity and to equalize competition at the point of delivery. By providing for publication of basing point prices it effectively prohibited rebating to local customers and other practices that had tended in pre-code days to break down the formal price structure contemplated by these systems.

The actual method of price filing used by basing point industries varied considerably. Thus the Iron and Steel Code required the filing of prices F.O.B. the base point nearest to a member's plant. All rail freight, extras, deductions, etc., were established by the code and authorized code authority rulings, so that price competitions was confined to the filing of base prices, with prompt uniformity appearing through a process of price leadership and the meeting of filed prices. A ten-day waiting period facilitated this arrival at uniformity before prices became effective. (*)

The code as written provided that if a producer did not file upon a basing point in the area in which he was selling, he should sell at a price in that area not lower than the lowest filed price. The code authority interpreted this to mean that producers filing on basing points other than their own must file at a price not less than the lowest price filed by members subject to that base point. By this means, any reduction of base prices had to be initiated by producers situated in the immediate price area for any basing point. The number of producers participating in the price-making process at that basing point was thus effectively limited. Such a limitation was not warranted by the code; it was directly instrumented by the price filing provision.

In the iron and steel industry, price filing served as an automatic impersonal mechanism to record and to perfect the process of price leadership, already dominant in the iron and steel industry. It contributed to the efficiency and smooth operation of the basing point control by preventing secret price cutting and local rebates, which had been in part induced by the basing point practice which tends to discriminate against purchasers located near a non-basing-point mill. By requiring adherence to base prices, the price filing provisions prevented open as well as secret departures from the basing point structure. Producers were less willing to cut a base price, which meant a cut to all consumers within the area, than they were to absorb freight in individual instances.

The practice of published prices had been general in the industry since the era of the Gary Dinners, so that price filing served largely as a mechanism for facilitating orderly changes in uniform prices, already well established by price leadership and by the basing point structure. The maintenance of these filed prices by distributors further preserved the pattern, and periodic re-filings paved the way for simultaneous changes.

(*) This waiting period was later deleted.

The Cement Industry Code omitted mention of any basing point system. The code did provide in Article X, 3, 4, d. that it was an Unfair Practice:

> " To divert or permit purchasers or users of cement to divert shipments of cement from one destination to another destination, the result of which will enable the purchasers or user to secure cement at less than the member of the industry's published market price at the point of final destination."

In this industry, the burden of maintaining the basing point practice was assumed, so far as the code was concerned, by the price filing arrangement. Prices filed were destination prices in every instance. The "meeting" of filed prices at the point of destination led to equalized prices for all producers, although the net returns to producers differed according to transportation costs to the destination. Basing points were multiple (approximately fifty). Base prices were not filed but could be easily ascertained by non-basing point mills, (about seventy in number), by a process of calculation from the destination prices and the official freight book compiled and disseminated by the Cement Institute.

The process was essentially similar to that followed prior to the code, although the medium was somewhat changed. An intricate system of salesmen's reports had been used prior to the introduction of N.R.A. price filing to keep producers (particularly non-basing point mills) informed of changes in base prices. (*) This was done by means of immediate reports from any salesmen confronted by bids at any destination point which were different than that arrived at by the previous base price plus applicable freight. An immediate check with salesmen in other localities would reveal other changes in destination quotations, and permit a simple mathematical calculation of the new base price.

The filing of destination prices under the code obviated the need for the continuous watchfulness of salesmen and insured a systematic record of all quotations. A change in a basing point price could be calculated instantly and the opportunity to meet destination prices in every instance was assured.

The increased convenience of this system to producers and its improved facilities for checking compliance with the basing point formula are obvious. The failure to file base prices and changes therein was unimportant to them, but it made the increase in publicity negligible so far as consumers were concerned. Destination prices on file were not all changed simultaneously with a change in the governing base price, but only as quotations were made for a new business at the location. Hence the consumer was still dependent upon salesmen's quotations for information. This probably was of minor importance, because of the general spread of such knowledge by salesmen, but it does emphasize the subordination of the general publicity function of the price filing plan to the checking function for the benefit of sellers.

(*) See p. 18 Chapter 1, for account of earlier experience with price reporting in the Cement Industry.

Destination prices were filed under the code for some 100,000 different destinations, by those producers interested in selling at particular points. The waiting period permitted refilings to meet any destination price, so that these were characteristically uniform, calculated at that basing point price plus freight which would result in the lowest destination price, all basing points considered.

The insistence that filed prices be delivered destination prices was explained by the code authority chairman, in a letter to the deputy administrator, on January 24, 1935, on the grounds that other forms of price quotation would defeat the premise that every market should be an open market, and that regardless of freight advantage or disadvantage a manufacturer should be free to compete wherever he desired.

Such arguments are essentially those voiced in favor of any basing point system. To the extent that the basing points in the cement industry were fixed and controlled by dominant industry leadership without the code, the filing of destination prices according to the basing point formula served the same ends of discipline as were achieved by the combined basing point and price filing provisions of the Iron and Steel Code. A potential flexibility in the number and location of basing point mills would tend to reduce the control element, but it is difficult to determine the actual extent of flexibility existent in the industry.

Participation in the price-making process for any destination was not limited in the cement industry either by the code or by price filing regulations. Actually, price leadership operated to a high degree in the initiation of prices. The number of mills following such leadership at a given destination point depended on those willing to serve the market (or to quote on a particular bid), and to meet the filed price by accepting a lower mill net for the shipment.

Destination prices were necessarily uniform. The intention of the industry to keep all elements of competition uniform is evidenced by other code provisions covering terms and conditions of sale, dealer relationships, etc. It is further indicated by the efforts to require the filing of destination costs to the United States government, and thus to prevent differences in bids that might arise through the application of land grant or other special freight rates. The practice permitted members to submit bids to the Government, based on a price F.O.B. shippers' mill, that would result in the ultimate destination cost quoted in the bid, when the freight rate was applied to the F.O.B. mill price. This practice was specifically authorized by the code as revised on May 11, 1935, but the provision was stayed in the Order of Approval for further study of its possible effects.

The cast iron soil pipe industry and the copper industry both perpetuated previous basing point systems by means of the price filing requirement in the code. In the former indistry, a single producing center, Birmingham, Alabama, was used as the base point, with an assumed base price of $100. (*)

(*) Frequent violations and evasions of filed prices were charged but the discounts on file were identical in most instances.

Trade discounts were deducted from this base, and freight from Birmingham to destination was added for the delivered price. If the shipment was made from a point other than Birmingham, the actual freight was absorbed by the shipper. The result was uniform delivered prices by all producers at any point in the United States. Members of the industry who objected to the practice claimed that although the use of the Birmingham base was not provided for in the code, they were warned that economic pressure in the way of destructive price cutting would be used against any member who did not conform to this practice. (*)

A basing point system was established in the copper industry by means of Regulation No. 3, Filing of Prices, which required that:

> "Prices filed shall be for electrolytic copper on the basis of Connecticut Valley delivery and shall include differentials for all other grades, shapes and points of delivery. The Sales Clearing Agency shall promptly advise all members of all such filed prices and differentials and by whom filed."

c. Uniform Delivered Price Zones.

This particular form of delivered pricing contemplates equalization of freight costs by each producer, so that all consumers located anywhere within a defined zone will be quoted the same delivered price regardless of actual freight costs. Presumably, the freight element is arrived at by some method of averaging freight cost upon all shipments to those located within the territory.

Essential administrative difficulties in enforcing such a method of freight equalization are obviously lessened by the use of price filing, with delivered prices filed applicable to the defined area (whether) filed regionally or centrally). Meeting of competition at the point of destination becomes possible by the meeting of one delivered price applicable to an entire zone. Price uniformity among producers is then easily maintained. (**) Any natural geographic advantages so far as freight costs are concerned are nullified, and the price structure is at the same time simplified for purposes of filing and dissemination of price information.

In addition to the advantages offorded by price filing to approved systems of uniform delivered zone prices, there are instances under NRA codes in which price filing requirements were utilized to set up such a zone system without code sanction.

(*) Letter to deputy from administrative member, May 2, 1935 (in NRA files). Letter from Walker Machinery and Foundry Co., Roanoke, Va. to deputy, May 19, 1934, NRA files.

(**) The term "uniform delivered zone price" in itself refers to uniform prices quoted by one producer to all customers in a zone. Uniformity among producers for standard products is a natural and expected result of such a process of freight equalization. It is facilitated and perfected by price filing.

The business furniture industry included in certain divisions of its proposed code (including steel office furniture, shelving and visible filing equipment), a provision that a zoning system be incorporated in connection with price filing, inasmuch as

> "Differences in freight rates and costs of transportation necessarily result in discrimination as between purchasers in different localities. In order to minimize such discrimination each member shall publish a price list for each of the following zones ...."

The system was to include uniform mandatory freight differentials to be added to the base prices, which were to apply to the Eastern Zone.

None of these zone plans was approved by NRA but they were put into use under the price filing plan by code rulings and recommendations drawn up by the planning and classification boards, on the assumption that authority was conveyed in the following provision in Schedule A:

> "The price and/or selling of any item of industry products below member's cost to the ultimate consumer as determined by the cost accounting methods set up by the Code Committee and subject to approval by the Administration, in the quantities and under the conditions and at the points of delivery involved is an unfair method of competition."

The code authority ruled that no member of the industry could file prices on other than a delivered basis, and reinstated the zones and zoning differentials proposed before. An opinion given by the legal advisor on the code indicated that this ruling could not be supported and that members were entitled to quote either on a delivery or F.O.B. basis. The cost accounting methods had never received NRA approval, so that justification for the mandatory recommendation did not arise from the above provision. (*)

The Paper and Pulp Code , as approved, provided for the calculation of prices on a delivered basis, with cost of distribution to be included as a part of cost. It did not specifically require the filing of delivered prices, but gave to the code authority the right to prescribe the " form" in which prices should be filed. The fair trade practice provisions presented by the sub-code authorities for various product divisions in January, 1934, proposed for several divisions a complete zoning system, with all quotations to be F.O.B. mill, carload rate of freight allowed. Four zones - Eastern, Central, Mountain and pacific - were established, with the requirement that the price base for all members was for delivery in the Eastern zone, with specific zone differentials to be added for other zones. Such a system of uniform delivered zone filing was maintained by code authority rulings and industry practice despite the fact that the trade practice provisions were disapproved by the Administration. The power granted under

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(*) Memorandum from Julian Johnson, Legal Advisor to Deputy Administrator, September 13, 1934, NRA Files.

the code for the code authority to prescribe the forms of filing may well have been deemed sufficient sanction for prescribing delivered price filing, by zones, but it did not in any degree sanction the requirement that uniform zone differentials be added to the price for the base zone. Such an end could have been achieved only through group acceptance of the trade practice provisions, under code authority direction, or by tacit process of follow-the-leader.

A similar restoration of price filing by zones was accomplished in the envelope industry after NRA sanction of a proposed zoning system was withheld and it was deleted from the code. (*)

(d) Other Forms of Delivered Pricing.

The use of delivered prices and freight equalization was not limited to those codes providing specifically for basing points or uniform delivered price zones. The fertilizer industry provided for the division of the industry into marketing areas for purposes of administration. These areas were ordinarily based on type of crop and soil, and differences in freight charges. They were not set up in connection with any specific device to govern geographic price relations, although it was provided in the code that regional committees might adopt uniform rules governing transportation which would be binding upon members after they had been approved by the NRA. Such rules were never submitted for NRA approval, although the practice of filing prices on a uniform delivered-to-the-farm base within zones was developed by a process of concerted action and price leadership under the price filing plan. (**) Members could file prices applicable to any zone or to any sub-division within a zone, but could not sell in any area without filing. Transportation charges were uniform in almost every area, with provisions for allowances for truck transportation and other transportation services rendered by the consumer. Any manufacturer could equalize freight charges to meet the lower price of a competitor more favorably located, by absorbing the freight charge and filing the lower price set by his competitor. The adoption of the delivered-to-the-farm basis of pricing was ostensibly for the purpose of simplifying the price structure and facilitating the comparison of filed prices. The practice probably contributed to this effect, although the ability to eliminate the distributor as an uncontrolled element in price competition was probably a more compelling argument.

(*) See below p. 321. The cork industry also proposed a zone delivered price system on the grounds that it was an existing practice in the industry. The provision was not approved by NRA.

(**) The resolution passed at the one administrative committee meeting is recorded in the minutes of July 11, 1934, calling for delivered to the farm basis of quotation, the schedule to show allowance for delivery from railroad or boat landing to farm. Decision as to the time of forwarding notice of action to the NRA was left to the executive director.

The Steel Castings Code Authority likewise required by regulation that prices filed by a member should be uniform delivered prices (with freight included) to all customers. This was part of the general formalized price structure set up by the industry for price schedules. (*)

The Code Authority of the Copper and Brass Mill Products Industry issued a Bulletin of Rules and Regulations on November 7, 1934, including requirements for delivered prices on all shipments of 100 lbs. or over, with prepayment of freight, as follows:

> "Rule No. 9. Freight Allowances. Terms of sale shall include prepayment of freight to any destination in the United States on shipments of 100 pounds net or more with the understanding that the shipper reserves the right to control the routing. Quotations shall provide: 'The prices quoted are f.o.b. (insert destination).' Where other than shipper's regular method of shipment is used terms shall be f.o.b. mill with actual freight allowed but at not more than the lowest published rate. Quotations for each shipment shall provide: "The prices quoted are f.o.b. mill, freight allowed".
>
> "Manufacturers shall not make any allowance to a customer who provides his own carriage or a shipment from the mill or any intermediate point.
>
> "All shipments under 100 pounds shall be f.o.b. mill, but if delivery of such shipments is made by seller a minimum charge of $1 shall be made, except that in the case of parcel post and express shipments the actual cost of delivery must be charged; provided, however, that such minimum charge shall be applicable only to shipments from the mill.
>
> "Excess transportation charges assessed by railroad or steamship companies covering shipments requiring special equipment in handling or transporting shall be charged to customers."

The code for this industry, in Article IV, contains authorization for this action, since it requires manufacturers to adopt and maintain equitable uniform contract terms and conditions to be established by the executive committee and since it states that it is the "policy of this code" to bring about uniformity in regard to consignments, freight allowances and other sales practices. Specific NRA approval of the terms adopted was not required, although they could, under the provisions of Article XV, have been disapproved. No evidence appears that the freight regulations were ever formally reviewed.

The Asphalt Shingle and Roofing Code contains no reference to

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(*) See report, Appendix B, P. 705.

transportation provisions other than a provision in the price filing article requiring distribution to each class of trade of the prices, terms and conditions of sale, affecting each such class of trade "in the territory to which such prices, terms and conditions of sale apply". This provision was apparently in recognition to the prevailing industry practice of freight equalization, whereby prices were quoted f.o.b. factory plus a delivery charge based on rates that would apply if the customers bought from the factory nearest to him. A zoning plan proposed by the industry in its merchandising plan (submitted in March, 1934, but never accorded NRA approval), would have simplified and systematized this practice by setting up a zoning plan. Under this plan each plant or group of plants in close proximity was made the center of a zone having an average carload freight of 10¢ per hundred weight. Shipment to zones located at greater distance from the plant or group of plants required successive freight differentials of 5¢ per hundred weight to be added to the delivery charge. In filing delivery terms prices could thus have been equalized in brackets of 5¢ per hundred weight rather than by the nearest amount of actual freight rate. The essential features of this plan were in force through the individual filings of industry members. Further detailed regulation of freight allowances according to customer classifications was also proposed in the merchandising plans. (*)

The vitrified clay sewer pipe industry attempted varied mandatory regulations of transportation terms by code authority action. Thus on December 12, 1933, the eastern regional code authority voted certain regulations to be in effect for a trial period of 30 days including the requirement that (with minor exceptions, noted) manufacturers must quote and sell pipe on the basis of F.O.B. cars nearest railroad station or spur, and that, for purchasers coming to the plant with a truck, under no circumstances was the price to be lower than "Schedule #1, no freight allowed". At the same meeting it was resolved that the secretary should require all firms to file in writing by December 14, 1933, schedules of prices of pipe delivered on the job.

Later, on June 27, 1934, manufacturers were informed by letter of Resolution No. 65, that the regional committee could establish delivery terms in the various trade areas which should be minima mandatory for manufacturers who quote delivered prices beyond the rail point nearest to the customer - i.e., f.o.b. job site dealers' yard, etc. Resolution No. 67, established such minima at 2 points of the list (2%). This was to apply to some thirteen eastern states. Later, 4 points of the list was established as a similar minimum charge applicable to Ohio. Each manufacturer was required to add these charges to his individually filed f.o.b. car prices.

These regulations were adopted pursuant to Article XI, section 1, which authorized the regional committee to establish "standard terms of sale" subject to review by the Administrator, but were issued to the

(*) See Appendix A for detailed account of the operation of these practices.

industry without prior review. (*)

The account of these and other activities of this industry in seeking to establish control over prices indicates the value of delivered pricing and the importance of mandatory regulation of transportation charges, as a means to preserving uniformity of filed prices and competitive terms. (**)

(e) Price Filing Zones and Anti-Dumping Zones

A number of NRA codes provide that prices shall be filed according to established zones or areas instead of with a central national agency, or that prices shall be filed to apply to separate areas, even though recorded with one national office. Such price filing zones do not imply, of necessity, any process of freight equalization or other regulation of transportation allowances (such as was described in the system of uniform delivered price zones) although some systematic regulation may be undertaken in connection with them.

The reasons for such divisional organization are ordinarily given as the necessity for simplifying the procedures of filing and disseminating prices. The practical considerations are obvious when there are many producers and many product classifications. If competition is more or less localized or if the points of supply are well scattered over the country, competition may be naturally limited to those producers in a common market area. Under such circumstances it is neither necessary nor useful to disseminate prices that are applicable in far distant regions. (***)

There is a further positive advantage so far as the industry is concerned resulting from the more friendly cooperative relations that can be built up within a smaller group. This element was highly emphasized by Mr. Eddy and the early advocates of price filing and has a distinct significance in forwarding the success of the mechanism as a stabilization measure, in that it emphasizes the interdependence between competitors and the values of cooperation. The opportunities for effective education and propaganda are much better in small units, with the further advantage, recognized in several codes, of adjusting particular market regulations and/or prices to local competitive circumstances. So long as such price filing areas are purely administrative in character, the advantages of smoother operation and less complicated mechanism for filing and disseminating will warrant their use. If price filing is intended primarily to serve as a stabilization device, such regional areas may further the desired voluntary restraint in price cutting better than would a system of national filing.

(*) See letter from J. T. Lynch, Assistant Deputy to D. M. Strickland Manager of the Eastern Regional Committee, 7-21-34, NRA filed.

(**) See pp. 300-312.

(***) See Chapter III, above p. 98.

In two other respects price filing zones may involve definite control of competitive pricing. In many instances price filing zones are used similarly to anti-dumping zones to limit the participation of outsiders in the formation of the price level. This is accomplished either by the simple device of forbidding producers to file prices in zones in which they are not located, or by requiring them to file prices no lower than the lowest price filed by a producer located in that area. (*)

The anti-dumping and price filing zones in the salt industry were synonymous in geographic area, with the code providing that a producer outside of a geographic area could not give a more favorable price to a purchaser in a given area than that purchaser could get in the area in which he was located. The restrictive effects of this segregation of price-making into areas were felt in particular instances in the discontinuance of commissions that had formerly been granted by outside producers to particular customers, including farm cooperatives. (**)

In one instance complaint was made to NRA that prices on one product in a particular area were controlled exclusively by a single producer, who had increased prices unduly and was able under the terms of the code to maintain them at that level because no outside company could file or sell in the area below the price established by this local producer. (***)

The prevailing practice of the industry for years prior to NRA had been to issue published price lists for the marketing areas in which a member desired to sell and to compile state freight rate books for use in arriving at delivered prices at any point within such market area. Freight rates were calculated per 100 pounds from the nearest producing fields. The result of these practices was uniformity of prices for all producers to customers located at each point of delivery, but no uniformity between prices charged to customers located at different points of delivery. The extent to whichcompanies would absorb freight was a matter of individual company policy in extending the sales area by meeting competition at the point of delivery. Prior to approval of the NRA code and price filing plan the restriction on undercutting prices in other areas was maintained on a voluntary basis. Under the code this

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(*) E. G., Lime Industry Code, as revised, paper distributing and salt producing.

(**) E. g., Correspondence between Farmers Elevator Service Co., the code authority, the deputy administrator, and the Jefferson Island Salt Company. For details, see Summary Report of Distribution relations in the Salt Producing Industry, Preliminary Report, Distribution Relations Unit, Trade Practice Studies Section, Division of Review, p. 12.

(***) Complaint presented at Price Hearing, January 9, 1934, NRA files.

practice was set forth and reaffirmed with the stipulation in Article IV concerning published prices that "The minimum prices published in any marketing field by any producer in that field shall be the lowest prices at which any producer may sell in that field."

Other price filing requirements allow members to file in zones other than their own, but require the addition of transportation charges to the price filed in the home area. Any of these three provisions effectively limits the ability of a producer to extend his price-making influence beyond his immediate area, even though it does not always shut him out from the market. (*)

The mayonnaise industry sought to limit freight absorption by a provision forbidding manufacturers to sell below their own cost (which must include the cost of transporation to destination) except to meet the "legal" price of another manufacturer. While this restriction was not accompanied by the setting up of anti-dumping zones, it was used for essentially the same purpose - to prevent distant competitors from undersellin local competitors, by forcing them either to add full transportation costs, or else to accept the filed price of local manufacturers. In other words, delivered prices might be equalized, but freight absorption could not extend to the point of lowering the going price list of local manufacturers. Warnings of prosecution for code violation were issued by the Code Authority on several occasions, including Code Authority Release No. 3, dated May 29, 1934, which state that:

> "....It is very important that manufacturers should note that quotations or sales made for shipment at a distance from the manufacturers plant can only be made "legally" at a price sufficient to cover the full cost of freight to the city in which the trade is located.
>
> "Some manufacturers who are selling at a very low price (approximately cost) in their own home market, are selling at distant points, where freight costs are considerably higher at the same price and are underselling local competitors. Such sales are made in violation of this Code since they are at prices below cost.
>
> "The Code Authority cannot accept for itself the responsibility of warning each manufacturer in such instances. It is the duty of each manufacturer to understand the code and to operate in accordance with the Code provisions and, therefore, it is suggested that each manufacturer view his own transaction in

(*) Compare the results with those set forth in the Preliminary Report of the Geographic Price Unit, op cit. pp. 10-12.

terms of this explanation. If any transaction is made in violation of this explanation, the Code Authority, in prosecuting violations of the Code, will deem that this bulletin gives full warning and such notice and explanation as required.

"No manufacturer may sell below his own cost (which must include the cost of transportation to destination) except to meet the "legal" price of another manufacturer ....."(*)

It is observed above that the filing of prices applicable to zones or limited marketed areas permitted and encouraged the preservation of regional differentials in price. This was in part due to the limitations on outside competition in the price-making process. Regional price filing is also conducive to the protection of a local competitive situation - either of price cutting or of a high degree of price control - preventing the general spread of a weaker price situation throughout a wide area. Or the entrance of outside competition that might tend to bring a lowering of prices within an area.

This result has been apparent in a few industries which altered their price filing requirement by code authority action to permit isolation, or special treatment of troublesome price areas. Thus, the Eastern regional committee of the vitrified clay sewer pipe industry, when faced with a severe price cutting situation in metropolitan New York, considered the advisability of abandoning price filing in that area in order to preserve the price sturcture outside New York, or of filing separate prices for the area which would not apply to the rest of the region.

In several instances price filing areas were made to coincide with previous trade association groupings; this facilitated compliance and cooperative action in observance of group marketing prices, regional price leadership, or other forms of control. This was particularly true of the Pacific Coast area.

5. Terms and Conditions of Sale

Regulation of the terms and conditions of sale afforded the various industries a significant form of control over the price structure. Price filing plans in some instances were useful as a means for checking conformance with such controls and in other instances as a means for the establishment of such regulations. In most cases, however, it is difficult if not impossible to distinguish between these restrictions which were established entirely apart from the price filing plan, in which case price filing served only in a policing capacity, and those which were established or intended as an integral part of the plan.

(*) In NRA Files, mayonnaise industry.

In any case, standardization of the terms and conditions of sale has been encouraged and defended by the industries as necessary in order to eliminate the evasion of filed prices through secret and indirect concessions. (*) The usual objection to the establishment of such uniform or maximum terms of sale, on the other hand, was that it constitutes one element of price fixing and to that extent serves to rigidify the price structure.

A review of the code provisions and of the available authorized and unauthorized regulations and rules promulgated by the code authorities indicates that all of the 57 industries selected for special study engaged in some form of regulation over terms and conditions of sale. Usually this was accomplished by a provision in the code, although the more detailed type of regulation was effected by the code authority rules and regulations, which often represented deviations from the powers granted by the code. In some instances the code and the code authority combined to prescribe limitations on price terms.

An indication of the degree of control exercised over the price structure through the method of standardization is presented in the following chart, which notes for the 57 industries the cases in which the code or code authority imposed some kind of restriction upon the use of eleven types of terms and conditions which have been chosen for illustrative purposes. Numerous examples of the restrictions adopted by individual code authorities in connection with the price filing plans are available, but are not included here. Many of them appear elsewhere in the report. Examination of the case histories of price filing in the steel casting and asphalt shingle and roofing industries (**) will indicate the manner in which such regulations may be used to discipline and to secure uniformity in the terms and conditions of sale filed by industry members.

Other illustrations given would serve merely to multiply the instances of such regulation.

(*) See Chapter III, above pages 118-120.

(**) See Appendices A and B.

Instances of Control over Price Structure by Regulation of Specified Terms and Conditions of Sale.

CODE NO.	NAME OF CODE	Cash Discounts and Credit Terms	Uniform contract terms & length of contracts	Consignment selling	Protection against price decline or adv.	Quantity discounts	Premiums	Advertising Allowances	Returned goods	Product guarantees	Subsidies	Trade-in allowances
275-A	Agricultural Insecticide	x		x	x	Y	x		x		x	
80	Asbestos				x		x	y	y		y	y
99	Asphalt Shingle & Roofing						x					
445	Baking			x		x	x	x	x			
37	Builders' Supplies		x				x					
88	Business Furniture	x		x	x	x	x			x		z
463	Candy	x		y				x	x	x		
333	Canvas Goods			x	x		x					
275-2	Carbon Dioxide											
202	Carpet & Rugs	x	x	x	x	x		z				
18	Cast Iron Soil Pipe	x	x	x		y			y			
128	Cement	x	x		x		x	x		x		
5 265	Coffee	x	y		x	z	x	y				
101 101	Copper	y										
81	Copper & Brass Mill Products	y	z	x	x							y
303	Cordage & Twine	x			x	x						
109	Crushed Stone, Sand & Gravel	y										
4	Electrical Manufacturing						x	x				
220	Envelope	x				x	x			x		
39	Farm Equipment	x										
67	Fertilizer		z	x	z	x	x	x	x			
98	Fire Extinguisher	z			x				x	x		x
92	Floor & Wall Clay Tile			x	x		x	x				
193	Folding Paper Box	x	x									
90	Funeral Supply	x	x		x			x				
134	Gas Appliances	y		x			x	y	z		y	x
275-3	Industrial Alcohol											
107	Ladder	y	z		x							
31	Lime	y	x	x	x		y	x			x	
234	Macaroni		y	x		y	x		x		y	
103	Machine Tool & Forging	y										
421	Marble Quarrying & Finishing		x									
59	Marking Devices	z				y						
349	Mayonnaise			x	x	z	x	x			y	
175	Medium & Low Priced Jewelry	z		x		x		x				
344	Metal Lath		x	x	x	x		x			x	
205	Metal Window		z									
78	Nottingham Lace Curtain	x		x	x							
176	Paper Distributing	y	x	x								
120	Paper & Pulp	y	x									
204	Plumbing Fixtures	z	y		x	x			x	x	y	
311	Ready Mixed Concrete	y	x			y						
366	Retail Monument		z									
410	Retail Rubber Tire & Battery	x	x		x		x			x		x
156	Rubber Mfg.	z	x	x	x		x	x	x	x	y	
20	Salt Producing			x	y	x		x			y	
114	Scientific Apparatus	y			x	x		y	y	x		z
167	Set Up Paper Box	y	z									
102	Shovel, Dragline & Crane	x	x		x				x	x		x
82	Steel Castings	z	x							x		
123	Structural Clay Products			x			x					
249	Tag Manufacturing	y		x		y						
23	Underwear & Allied Products	x		x		x		x				
163	Valve Fittings	x	x	x	x					x	x	
136	Vitrified Clay Sewer Pipe	z	y	x		y	x			x		
458	Wholesale Confectionery	x		x				x				
291	Wood Cased Lead Pencil	x	x		z		x					
	Totals	39	28	26	25	22	21	20	14	13	11	8

Key to Symbols:

x - Regulated by the code provision
y - " " " code authority
z - " " " code and code authority

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D. APPLICATION OF PRICE FILING CONTROLS TO DISTRIBUTORS

The relation of the price filing requirements of manufacturing codes to the resellers of products presented constant difficulty in the operation of price provisions and in NRA administration of open price plans.

These difficulties can be grouped roughly in two classes, although they varied somewhat from code to code. They involved:

(1) The possible use of distributors, either controlled or independent, as a means of evasion or subterfuge to avoid adherence to filed prices, and

(2) Competitive disadvantages that might arise because some sales at a given distribution level were made in accordance with filed and open prices, while others were unrestricted either by publicity or the necessity of adherence to published prices.

The second type of problem was still unresolved, so far as official NRA policy was concerned, at the close of code operations, although cumulative administrative and economic difficulties had arisen to indicate the need for some guiding principle to follow in code revisions. (*)

Accounts of pre-NRA open price plans throw little light on the problems of distributor participation in price filing plans set up by manufacturers. This may be explained by the circumstances (a) that voluntary open price systems were usually composed of sellers with common interests and methods of operation, (b) that they did not bind their members to current or future prices, and hence left them free at any moment to meet the prices quoted by those not participating in price filing, and (c) that since pre-NRA price filing plans rarely included all the manufacturers of a product, the non-participation of distributors was of relatively less importance.

The two problems outlined above presented distinct issues of public regulation, and hence will be discussed separately, even though the pertinent code provisions did not always differentiate clearly between the two purposes of preventing subterfuge and of equalizing competitive advantages, and the activities of code authorities pursuant to such provisions were even less separable.

(*) A committee, under chairmanship of Willard Thorp was appointed under Office Memorandum 333, February 1, 1935, to study and to conduct hearings on distribution differentials in codes. This committee included unequal price filing requirements among the topics for study and report, but no formal recommendations were ever released as a result of their investigations. The extent to which complete publicity was deterred by exemption of distributors from price filing requirements is treated on pages 104 and 110 of the previous chapter.

1. Prohibition of Subterfuge or Evasion of Price Filing Requirement by Members through Use of Distributors.

The first problem - that of preventing evasion of price filing by members - was primarily one of compliance and enforcement of price filing requirements approved by NRA and made mandatory upon code members. Deliberate evasion of the requirement of publicity through a controlled source of distribution, or through collusion with an independent distributor, was a patent code violation. Hence, the explicit proscription against such an evasion or subterfuge, when needed, was entirely in keeping with the intent of the price filing requirements of a code, and did not entail extension of those requirements to groups that had not participated in code drafting and were not subject to the provisions.

But even though the principle involved was clear, the compliance problem of determining just when a distributor was controlled, or when there was actually collusion to defeat the purpose of the price filing, raised frequent difficulties. In other instances, the prohibition against subterfuge served to emphasize unequal competitive relations between member-manufacturers, which led to a demand for controls to bind independent distributors, or to delimit the conditions under which member-manufacturers might deal with such distributors.(*)

Code provisions forbidding members to utilize distributor channels as a means of evasion of the price filing requirements were limited in some cases to sales through wholly-owned or controlled sales affiliates, or through controlled brokers, agents, or commission salesmen. In other instances, they were more general, forbidding members to diverge from filed prices "either directly or indirectly through distributors, or otherwise". Provisions of the former type were upheld by NRA, and occasional interpretations ascribed such obligation to controlled outlets even when the code did not specifically bind them to observe the prices filed by the parent company. The principal-agent relationship was considered the governing factor in such cases, with the member company responsible for the prices of distributors and brokers, when they were truly acting in the capacity of an agent and did not take title to the goods. Despite this general attitude, the NRA did not impose the requirement with any consistency.(**)

Typical code provisions governing controlled outlets were those contained in the valve and fittings, the metal window, the ready-mixed concrete, the asphalt shingle and roofing, asbestos, and crushed stone, sand and gravel codes.

The Valve and Fittings Code (53) Article IV, Sec. 13, provided that

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(*) See next section, pages 276 FF

(**) E.g., Ruling and interpretations in the Cast Iron Soil Pipe Industry. See also Item 1126, "Controlled Enterprises", page 13, Work Materials No. 20, by Alvin Brown, Division of Review, "Policy Statements Concerning Code Provisions and related Subjects."

"A sale made by any member of the industry through an affiliated producing company of such member shall be deemed a sale made by such member." Despite this code provision governing affiliates, the problem of other kinds of controlled outlets caused great difficulty in the valve and fittings industry. Some of the larger companies, including the Crane Company, distributed largely through warehouse and branch outlets. The industry apparently could not agree on an interpretation of their status, and the deputy administrator did not issue one on his own responsibility. One resolution of the code authority undertook to deal with the problem by requiring members to separate the operations of branch houses and controlled warehouses from those of the parent company and to require that they invoice goods to such controlled outlets at regular filed distributor prices as a completed sale rather than a bookkeeping transaction. The ruling further attempted to require the controlled branch or warehouse to maintain the manufacturer's prices in resale. The deputy objected to this attempt to treat such outlets in a dual capacity -- as independents in buying and controlled in selling -- but apparently accepted the first requirement that they be treated as independent warehouses or distributors. Such a partial ruling of course, did not resolve the basic issue of control of resale prices by distributors, although if enforced it might have put direct sellers (with controlled outlets) and those selling through independent distributors and warehouses on an equal plane of freedom to depart from filed prices in the secondary market. But the possibilities of using controlled outlets as a subterfuge to diverge from filed prices were too great for this to serve as an entirely satisfactory solution of the problem.

The plumbing fixtures industry utilized a somewhat similar approach, requiring manufacturers to segregate their wholesale business and to invoice to such departments at prices similar to those filed for independents. This was to have been accompanied by a mandatory differential between wholesale and retail sales, so that the products of all manufacturer's prices to wholesaler plus differential. The fact that this differential was not established, and that price-filing in the Wholesale Plumbing Code (which required maintenance of manufacturer's prices) was not put into effective operation contributed to the price filing difficulties in the plumbing manufacturing industry, and the failure of the device as a stabilizing measure.

The Metal Window Code (205) Article XV defined affiliates and parent corporations, and stated that, "Any such parent corporations shall be responsible for the observance by any affiliated corporation of all appropriate provisions of this code."(*)

The provisions in the asphalt shingle and roofing and the asbestos codes were very similar.

The Ready-Mixed Concrete Code (311) Article VII, Section 2, required that, "No member of the industry shall directly violate this code by disposing of his industry products through a middleman whom he controls by stock ownership, or any other form of ownership, and who does not adhere

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(*) Codes of Fair Competition, As Approved Government Printing Office, Volume V, page 150.

to the standards of fair competition established by the code."

The Crushed Stone, Sand and Gravel Code (109) Article VII, ii, stated that "since the great volume of industry products is sold by producers direct to consumers no producer indirectly shall violate this code by disposing of his products through a middleman whom he controls by stock ownership or otherwise and who does not adhere to the standards of fair competition established in this code."

Code provisions that included other than controlled affiliates in forbidding evasion may be exemplified by those in the Vitrified Clay Sewer Pipe (136) and the Shovel, Dragline and Crane (102) codes.

Article XIII, Sec. 3, of the former code defined an affiliated company, and stated that, "No member of the industry shall sell, directly or indirectly, through an affiliate company or otherwise by any means whatsoever, any of the products of the industry at a price lower, or at discounts greater or on more favorable terms of payment than those provided in his current net price and/or price lists and discount sheets, so filed with the Committee as aforesaid." (Underlining Supplied)

Article VII, Sec. 2 of the Shovel, Dragline and Crane Code included the requirement that, "Any deviation from the standards set forth in this Article VII, or any amendments thereto, by any member of the industry, either directly or indirectly through a distributor, shall be considered an unfair method of competition and a violation of this code by such member." (Underlining Supplied)

Such phrases as "otherwise by any means whatsoever" and "indirectly through a distributor", failed to make clear the extent to which members were obligated for the behavior of independent middlemen and the means which they were to employ in discharging their obligation. Ostensibly, the provisions applied only to deliberate subterfuge, but they were not always so interpreted by the industries concerned. Thus, the Business Furniture Code (88) included in four of its supplementary codes the following ambiguous provision:

> "No member shall sell any industry product contrary to his published prices, discounts, or terms of sale; and since a substantial majority of the industry's products are sold direct by the manufacturer to the consumer, and since the purpose and effect of this article would be otherwise defeated, it shall be an unfair method of competition for any member to distribute to the user industry products indirectly through an agent, dealer, broker, or otherwise, contrary to his published prices, discounts, or terms of sale."

There is apparent in such a provision the mingled intent to prevent subterfuge and also to equalize competitive relations at the consumer level, by making members of the industry responsible for the behavior of middlemen in preserving their published prices and terms of sale. This provision was interpreted by the code authority to constitute a resale price maintenance requirement, and caused prolonged controversy between the Administration and the industry. The problem of equalizing competitive

positions under the price filing provision was clearly more disturbing to this group than the problem of preventing subterfuges or evasions of the price filing requirement. Before relating the experience with this provision, it is desirable to examine briefly the nature of the problem of competitive disadvantages arising when distributors are exempt from price filing requirements of manufacturers' codes.

2. Elimination of Competitive Disadvantage Arising When Distributors are Exempt from the Price Filing Requirement.

The desire to make distributors subject to price filing requirements arose most frequently in industries in which direct selling existed side-by-side with distribution through middlemen. In such industries, manufacturers filed prices applicable to ultimate consumers as well as prices applicable to jobbers and other distributors who bought the products for resale. So long as the latter were not subject in some way to price publicity, and to restrictions of the price filing plan, they competed in consumer sales on their own terms, and were able to cut under consumer prices filed by manufacturers without disclosing their own prices or pricing practices.

A similar situation existed when manufacturers filed prices both to retailers and to wholesalers while those wholesalers were free to sell to retailers at any price they chose without prior announcement of publicity. The complications were perhaps greatest when (as in the business furniture industry) groups of manufacturers used distinct channels of distribution, one group selling direct to the consumer through wholly-owned subsidiaries or retail outlets, or through agents, brokers or commission salesmen, while others sold through independent wholesalers and/or retailers. The first group would file consumer prices with discounts, and was forced to adhere to these prices in all sales; the latter group might file prices in the same manner or might file only to primary distributors. In either case, if they were not held responsible for the prices of the independent dealers through whom they marketed their products, the products of the two manufacturers would meet in the consumer market, with the direct seller faced with secret competition from his competitor's products when they were resold.

The business furniture industry may have anticipated just such a situation in drafting the provision quoted in the previous section. It had initially asked for an explicit resale price maintenance clause, which was denied by the Administration. The modified provision, linked to the price filing requirement, was substituted.(*) The result was, as indicated, conflicting interpretation of the code. The industry was successful for a period in requiring adherence by dealers to the published list prices of manufacturers, but was faced with increasing non-compliance from such dealers after the NRA New York Regional Office refused to interpret the code to mean that members were responsible for maintenance of published prices through independent resale channels.

(*) The fact that the original proposals of the industry included resale price maintenance, mandatory discounts and price differentials as well as price filing suggests that price control was the primary objective of the industry.

The code authority then sought, on plea of an emergency, to incorporate a provision in the code requiring members to secure resale price maintenance contracts with dealers, with liquidated damages to be paid by dealers not conforming to such contracts. The Administration refused to give its assent to such a proposal, despite the insistence of the code authority that the only alternative was complete breakdown of the price filing plan because of the inevitable violations by direct sellers, who would be forced to meet dealer competition at the consumer level.(*)

a. Policy Consideration Involved.

The type of distributor problem presented to NRA in this instance involved a somewhat different administrative problem than that of preventing violations of the price filing plan through subterfuge. To insist that price filing requirements be imposed upon groups not otherwise subject to a code, simply to preserve or to bolster the price regulation desired by the original code sponsors, and to protect them from competition from others not subject to the regulation, was not in accord with NRA's usual policy of allowing an industry to propose its own forms of regulation and of limiting the jurisdiction of a code to the industry's own members.

The price filing provisions in NRA codes were ordinarily sought by industries themselves and were not imposed by the Administration. Since the NRA had not chosen to impose price filing on the manufacturer group, it could not with consistency impose it on a separate distributor group unwilling to accept it.(**)

(*) For reference to above, see Research and Planning Report, Code Administration Study of the Business Furniture Industry, Library, Division of Review: "The qualified resale price maintenance clause was included to place direct selling manufacturers and those who sold through dealers on an equal basis,"..."adherence by dealers to the published list prices of manufacturers has been usual. A small minority in the industry, however by consistent non-compliance with Code Authority rules have nearly caused a breakdown of the entire elaborate control system which has been set up."

(**) Cf. the statement made by Corwin D. Edwards, at the Hearing on Distribution Differentials, March 14, 1935, Dr. Edwards was asked by Dr. Willard Thorp, Chairman, whether he believed that an effort ought to be made to treat the two groups (jobbers and manufacturers) as far as they do the same thing, in the same way. Dr. Edwards indicated general agreement with this point of view, but made the further point "that the group which has been tied by code provisions in most cases (since the codes have been written at the initiative of industry) has chosen to tie itself, and that the argument for tying an additional group in the name of fairness is only strong if there is very strong public reason why tying is desirable. The argument for untying the group which is at a competitive disadvantage ought to be the prevailing one in all cases in which the regulation itself is not clearly a public one; in other words, in cases in which you would not consider imposing the regulation upon the industries if they did not want it." Mimeographed report. "Discussion from Record of Hearing on Distribution Differentials,"-following statement of Consumers' Advisory Board by

Nevertheless, the NRA had shown itself ready, in most cases, to encourage price filing provisions under proper restrictions, and to admit to codes such accessory provisions as seemed necessary to effectuate them, so long as these did not actually contravene declared policy or constitute price fixing. This attitude may explain in part the various compromises and inconsistencies in the treatment of the distributor price filing problem revealed both by code provisions and by the administration review of code authority rulings, and other extra-legal attempts to govern distributor price filing relations. The frequent inequities resulting from the exemption of distributors from price filing were recognized, but it was also recognized that unless distributors were actually made parties to a vertical code, the effort to bind them to observance of filed prices led in many cases to resale price maintenance contracts, and/or to secondary boycotts of distributors not willing to sign such contracts or to comply with manufacturers' filed prices.

These intended results were apparent in approved code provisions for a number of industries. In other industries they became apparent only through subsequent rules and regulations of the code authority, many of which were without any sanction from the Administration. Still other industries, faced with complications arising from secret competition by distributors, sought to extend some control over their price quotations by code amendments or formal interpretations from the NRA.

b. Code Provisions Extending Price Filing Requirements to Distributors.

In addition to codes including distributors as members of the industry, and hence subject to price filing, code provisions meant to extend the price filing requirements to the distributor group fall into three general categories:

1. Provisions making it mandatory for members to secure contracts from distributors, binding them to abide by the applicable provisions of the code or by the manufacturers' own filed prices;

2. Provisions permitting members to require such contracts.

3. Provisions forbidding members to sell to distributors not conforming to the trade practice provisions or otherwise non-cooperative.

In practical operation, provisions of the two latter types were apt to lead to mandatory code authority rulings similar in intent and in results to the mandatory code provisions, unless dealers were ready to cooperate voluntarily in maintaining open prices, either by filing or by adhering to the prices filed by their suppliers.

1. Distributors Included as Members of the Industry

Difficulties in compliance were not infrequent even when jobbers were, by definition, subject to the code and its price filing provisions. If distributors were numerous and not well organized or if they were

dealing in many related lines of product, they were little inclined to conform to detailed price filing requirements.(*)

Thus the Farm Equipment Code (20) defines the industry as including those engaged in the "manufacture and/or assembly and/or sale other than retail," of farm equipment, yet the code authority experienced difficulty from the very outset in securing price filings from the independent wholesalers, who claimed that they had had no voice in the code and were not subject to it. Some account of these difficulties is given in the Code Administration Study of the Farm Equipment Industry:

> .....jobbers, particularly hardware jobbers, maintained that they were not subject to the Farm Equipment Code because they were operating under the General Wholesale Code. ....The files of the Administration disclose that there was a great deal of correspondence and discussion relative to the disinclination of a certain class of jobbers to comply with the price filing requirements.(**)
>
> "On April 21, 1934, the Secretary of the Coordinating agency telegraphed the Assistant Deputy Administrator requesting a statement of the position of the Administration regarding jobbers under the Farm Equipment Code. The telegram particularly asked for an opinion regarding the desirability of obtaining jobbers' assent to the code by requiring as a condition precedent to the granting of jobbers' discounts that jobbers first assent to the code. The Assistant Deputy Administrator's reply of April 22, 1934, recommended making jobbers discounts dependent upon assent to the code if they were not otherwise disposed to comply.(***)

Apparently the advice of the assistant deputy administrator was followed by the coordinating agency. Farm equipment manufacturers were asked to file lists of their jobbers, and the latter were then asked to give assent to the code and its fair trade practice provisions, with the understanding that they would be refused the jobbers' discounts if they did not give such assent.

But the controversy did not end with this. There was an exchange of letters in September, 1934, between the secretary of the Wholesale Hardware Trade Association and the assistant deputy administrator, in which the former pointed out that it was out of the question to require hardware wholesalers to file prices on some 700 small or large items of farm equipment, and stated:

> .....that all his contacts with the Administration had impressed

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(*) E.g. Scientific apparatus, farm equipment, carbon dioxide, vitrified clay sewer pipe.

(**) Research and Planning, Code Administration Study, The Farm Equipment Industry, Division of Review.

(***) Op. cit. pp. 38 ff

upon him that the Administration would not countenance any condition whereby manufacturers might exercise any control over the selling prices of independent wholesalers.

The assistant deputy administrator wrote back assuring him that beyond any doubt such wholesalers were subject to the Farm Equipment Code when selling farm equipment. Still a later letter from the Administration Member of the coordinating agency (the code authority), dated February 16, 1935, indicated that members of the Hardware Association had not yet been willing to file prices.(*)

The action taken by the industry in denying jobbers discounts was tantamount to a boycott of all distributors refusing to comply, and appears a questionable method of securing compliance with the price filing provision despite the fact that jobbers were, according to definition, included under the code and might have been subject to prosecution for violation of its provisions.

The funeral supply industry included jobbers as members of the industry, but instead of asking them to file prices, the code made it an unfair practice to "extend to any customer, either retail or jobber discounts and terms differing in any way from the manufacturers' published discounts and terms." This provision was defended by the Code Authority Secretary, John Byrne as follows:

> .....It is manifest that manufacturers cannot maintain volume and quantity discounts if they cannot bind their jobbers to maintain the same volume and quantity discounts. There is no reason why jobbers should be permitted latitude which is denied to manufacturers, particularly in an industry where manufacturing and jobbing functions are practically indistinguishable.(**)

The price filing provision of the code refers only to "members" and does not specifically exempt jobbers from filing prices. This may be accounted for by the fact that jobbers were really manufacturing distributors who filed prices on the product they manufactured and were expected under the above provision to maintain their suppliers' filed prices on the products they bought to supplement their own line.

2. Mandatory Contracts with Distributors

The Iron and Steel Code, Schedule E, Section 4, approved August 19, 1933, contains a provision essentially similar to the amendment proposed by the Business Furniture Code(***)and denied by the Administration in February 1935. It reads as follows:

(*) Op. cit. page 44.

(**) See Transcript of Public Hearing on proposed code, September 19, 1933, page 85, NRA files.

(***) See page 276 above.

> Before any member of the code shall allow any such deduction to any jobber or sell for resale to any purchaser who shall not be a jobber...such member shall secure from such jobber or such other purchaser an agreement substantially in a form theretofore approved by the Board of Directors...whereby such jobber or other purchaser shall agree with such member (a) that such jobber or other purchaser will not, without the approval of the Board of Directors, sell such product to any third party, and (b) that, if such jobber or such other purchaser shall violate any such agreement, he shall pay to the Treasurer of the Institute, in trust as and for liquidated damages the sum of $10. per ton of any product sold by such jobber...

The price "at which such member might at that time sell such product" referred, of course, to the prices filed under the open price system of the Iron and Steel Code. This was generally recognized as a bona fide resale price maintenance clause, and was condemned by the Federal Trade Commission in its two reports on the basing-point system in the iron and steel industry. (*)

The Lime Code (31) as first approved, contained in Article IV, Section 1, the following provision:

> Unfair Methods of Competition - Transactions with Jobbers, Distributors or Brokers. - It shall be an unfair method of competition for any manufacturer to create or enter into relations with any jobber distributor or broker except subject to the condition that such jobber, distributor, or broker shall agree to be bound by all the applicable provisions of the code relating to the sale of the various types of lime.

The Code History reports that under this provision the manufacturer was responsible for sales by his brokers and jobbers and was required to see that they complied with the applicable provisions of the code, thereby eliminating one form of "chiseling" by distributors. The amended Lime Code omitted this particular provision, but contained in Article IX, Sections 14 and 15, a classification of jobbers and requirements concerning their treatment under the code. These sections were stayed in the Order of Approval, a stay regarded by the author of the Code History as a great mistake in that it permitted "breakdown of fair competition through the distributor channels," and "jeopardized the working of the open price policy," by tending to set up "what were

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(*) Practices of the Steel Industry under the Code, Senate Document No. 159, Section 14, 15, pp. 35, 38, and Report of the Federal Trade Commission to the Senate with respect to the Basing Point System in the Iron and Steel Industry, November 1934, page 10.

in effect secret prices instead of open prices." (*)

The Cordage and Twine Code, Schedule "A", Cordage and Wrapping Twine, Section 3, provided that the code authority, with the approval of the administrator could arrange conferences with all classes of secondary sellers to establish commissions, trade discounts or allowances based on nature and extent of distributing services and functions. Subsequent sections provided for mandatory adherence to such schedules after approval, except that members would be required to decrease the allowance to any secondary seller who allowed an excess allowance to a customer. The decrease was to "equal and not exceed" the decrease given by the secondary seller. The code also provides for the appointment of mill agents and distributors under specified conditions, including an agreement either to abide by code provisions, or to act in the capacity of exclusive agent. Names of all mill agents and distributors were to be filed and made known.

The Agricultural Insecticide and Fungicide Industry Code (Supplement 1 of Code 275) provided in Article V, Section 2 that:

> Every member of the industry shall enter into a written agreement with his jobbers whereby all such jobbers agree to file price schedules in accordance with Article VI of this code and abide by the following provisions of this Article V, Section.....

An excerpt from the transcript of the Public Hearing on February 7, 1934, indicates clearly that the purpose behind this requirement was to maintain manufacturers' prices. The draft of the code under consideration at that hearing stipulated that jobbers agree to abide by Trade Practice provisions. Mr. George Haddock, representative of the Consumers' Advisory Board, in discussing the industry proposal, remarked as follows:

> The intent of your industry here, it appears to me, is to compel the jobbers not only to maintain your fair trade practice provisions, but also to maintain your prices to dealers.

Mr. Hitchner, representing the code sponsors, answered:

"That is correct." (**)

(*) Division of Review, Leon H. Markey, History of the Lime Industry Code, page 109. The amended code evidently relied on the customer classification for control of jobbers rather than the direct agreements previously required. It is not entirely clear whether under the original code jobbers were required to file their own prices or to adhere to manufacturers' filed prices.

(**) Transcript of Public Hearing on proposed code for agricultural insecticide and fungicide industry, p. 140-142 (In NRA files.)

At a later hearing the deputy administrator in charge of the code, (Battley) indicated that he was going to ask the industry to revise the wording of the proposed provision:

> It appears that you are trying to establish or may establish a boycott and while we do not allow one group to write a law covering a group not represented here, I think you can rewrite it so that it will in effect carry out your intent, without stating definitely that you would boycott any dealer.....

The provision, worded as quoted above, was approved on May 1, 1934 for a period of six months. Even in this revised form it did not remove the possibility of boycott through withholding the jobbers' discounts from those jobbers who filed prices not acceptable to supplying manufacturers. Hence, the requirement that jobbers file their own prices was at best a compromise, possibly accepted in this instance because of the conditions which led later to emergency price control. (*)

The Cork Industry Code, Article VIII, Section 6, described the diverse distribution menthods followediin that industry, and required dealer contracts, as follows:

> Many members of the industry sell their products through agents, distributors, jobbers, wholesalers, and/or contractors, while others sell their products directly to the ultimate user. In order to prevent indirect evasion of this Article VIII by those members selling through agents, distributors.. it is hereby provided that the Executive Committee.. subject to approval of the Code Authority and the Administrator shall prescribe appropriate forms of contracts to be entered into between members of the industry and agents, jobbers...(except retailers) for the distribution of the products of this industry and the observance of such prices and terms as those currently filed with the code authority at which the manufacturer sells such products.

(*) The requirement that members adhere to filed prices was stayed on July 30, 1934 for a period of 60 days. Cf. Administrative Order 275-A-6. Later, on November 22, 1934, the price filing requirement in Article VI (a) was stayed for 60 days. This was subsequent to an emergency declaration and the determination of lowest reasonable costs for lead arsenate and calcium arsenate on November 9, 1934, NRA Files

Because of the anxiety of the cork manufacturers to bring importers under the jurisdiction of the cork code, the definition of the industry had originally been drawn to include primary resellers of the product. Distributors thus made subject to the code objected that they had no voice in its drafting and were not willing to be bound by its provisions, including the requirement that they sign contracts to maintain manufacturers' filed prices. Their protests were upheld by the legal adviser on the code and an amendment to the code definition was approved in September, 1934, excluding distributors from code membership.

But the industry was still intent on requiring individual manufacturers to bind their distributors by contracts. The cork insulation division drew up a prescribed form for such contracts to be utilized by its members, and submitted it for NRA approval. The contracts were opposed by certain advisers to the Deputy and the matter was referred to the advisory council for consideration and recommendation to the National Industrial Recovery Board. The council recommended against approval of the suggested contract form, which followed the existing code provision in providing that distributors should maintain the prices currently filed by their suppliers, but proposed a substitute compromise plan by which distributors would be asked to sign contracts obligating them to file their own prices and to adhere to them. This recommendation was accepted by the National Industrial Recovery Board and led to the amendment of the code in January, 1935, and the substitution of a new provision governing contract relationships with distributors. This provision was limited to 60 days unless 75% of distributors representing 85% by volume indicated their willingness to accept such contracts. The code authority enlisted the votes of 127 largely exclusive agencies, in support of the plan. Only one opposing vote was recorded, a result not surprising, inasmuch as their eligibility to vote (as distributors) was determined by the Code Authority itself. After the provision was approved other distributors could either sign the agreement or be refused distributor discounts.

The intent of this provision was exactly the same as that of the one originally in the code, although the means were modified. The ostensible freedom of distributors to file their own prices was limited by the possibility of boycott, or the denial of the distributor discounts to any distributor presuming to file prices lower than those of his supplier. The compromise recommended by the council was reminiscent of the attitude of the deputy administrator who sought to reword a similar requirement in the Agricultural Insecticide Industry Code so that it would not actually state that members would boycott non-cooperative distributors but would effectively limit price competition from that source.

The period during which this provision was effective was too short to supply evidences as to whether there would have been need to discipline distributors by such means or whether the existence of potential economic pressure would have been adequate to secure continued cooperation. (*)

(*) For references for above, see "Manufacturers' Control of Distribution: A Study of Trade Practice Provisions in Selected NRA. Codes," Division of Review, March 1, 1936, Part II, Ch. II.

The Code for the Carbon Dioxide Industry, as approved on May 4, 1934, contained in Article IV, Section 4, Contractual Relationship with Jobbers and/or Distributors, the requirement that every member of the industry enter into a written agreement with his jobbers and/or distributors within the metropolitan areas of plant and/or warehouse cities, whereby the latter would agree to file price schedules and to abide by certain other fair trade practice provisions. It also required that members of the industry file a copy of each agreement with the code authority. This provision was to remain in effect for only six months unless extended by the administrator. (*)

It was extended by two Administrative Orders, (275-B-18, December 3, 1934 and 275-B-19, January 2, 1935) until January 30, 1935, when it was allowed to lapse after a hearing on December 20, 1934, because of continued opposition from small manufacturers and independent jobbers.

The provision was urged by the code sponsors, the Carbon Dioxide Institute, on the ground that members of the industry often sold to retailers, and that secret price cutting would persist, if the resale prices of the jobbers were unknown. The Research and Planning Division was willing to approve the provision only for a limited trial period, stating its reason for opposing it as follows:

> This division is opposed in principle to any attempt to bind jobbers or other distributors to comply with terms of manufacturers' codes. We believe that such action, in connection with operation of an open price system, might result in resale price maintenance, restraint of trade among distributors and consequent exploitation of consumers. (**)

Repeated charges of monopoly in this industry, alleged misuse of the price filing provision to effect customer classification, and complaints that dominant manufacturers were using controlled distributors to foment price wars and drive independent distributors out of business, led finally to amendment of the Carbon Dioxide Code to substitute the provisions of Office Memorandum 228, and to the investigation of the price filing operations mentioned in an earlier section of the study.

(*) See Order of Approval, and Report to the President in Approved Code No. 275 - Supplement No. 2

(**) Carbon Dioxide Industry, Volume A and B, Report of the Research and Planning Division, April 11, 1934 (In Code Record Files)

The report of the investigator substantiated in large measure the charges of attempted price control through the means indicated. (*)

The order approving the Code for the Wood Cased Lead Pencil Manufacturing Industry stayed many of the provisions governing pricing practices, discounts, differentials, etc., including one meant to bind dealers to observe resale prices filed by manufacturers. Article X, Section 14., ordered members to abstain from giving discounts of more than 25 per cent off list on pencils retailing at five cents or less, until they obtained written agreements from dealers stating that they would not, without the consent of the code authority, sell to the consumer at less than the member's filed list price. These agreements were to stipulate further that the dealer would in turn require a like agreement from any dealer to whom he resold the merchandise. The penalty for non-observance of such agreements by the dealer was to reduce the applicable discount rate to 25 per cent off list. Dealers that executed, delivered and complied with the agreements were to receive a discount of 40 per cent off list. Manufacturers would, of course, have been in violation of the code if they had not required such agreements.

The essential boycott element in this arrangement through the use of an unfavorable trade discount is more apparent when it is noted that the code made no functional distinction between wholesalers and retailers, but designated both types of outlets as "dealers", and put all price differentials on a volume basis. The code sponsors insisted that it was not practical in that industry to distinguish between wholesalers and retailers.

Opposition to the control provision of the code binding dealers to manufacturers' list prices was registered by the National Retail Dry Goods Association, mail order houses, and chain stores which insisted that it constituted resale price maintenance. (**)

(*) Research and Planning investigation of Price Filing and Customer Classification in the Carbon Dioxide Industry, May 29, 1935, by Al F. O'Donnell, Division of Review. The report was completed only at the time of the Schecter Decision and hence there was no administrative action based upon its findings.

(**) See summary of report on "Distribution Problems in the Wood Cased Lead Pencil Industry, prepared by Mr. A. A. Kimball, Distribution Relations Unit, p. 26, NRA files.

> "Another set of provisions, which provided for resale price maintenance provided a boycott upon dealers who failed to contract to maintain such resale prices and to sell only to such other dealers as made similar agreements through the use of an unfavorable trade discount.....They were severely criticized by certain dealer organizations as an invasion of the rights of non-members of the industry....."

Although the open price filing provision of this code was not among those stayed when the code was approved, the code authority made no attempt to put price filing into effect after it was unable to get the minimum price schedule approved and the suspended marketing rules reinstated. Presumably the industry program for price control was made ineffective by their suspension. Nine months later the price filing provision and a provision barring the price discrimination between customers of the same class were stayed at the request of the code authority. It is not possible to say just which provisions were deemed essential to the effective operation of price filing, but the inability to require dealers to maintain the filed list prices was obviously one factor leading to the decision to abandon price publicity.

The Asbestos Code, Article VII, Section 5, provided that each Sub-Division could through its sub-code authority set a date after which no member of the division could

> sell to any buyer for resale more than one small introductory order unless the buyer has agreed in writing (1) to make no improper use of the members' merchandising plans, prices, terms and/or conditions of sale or otherwise misrepresent the policies or products of the member; (2) to sell from a list no higher than that from which the products were purchased (3) to observe all of the provisions of this code insofar as they are applicable.

"To make improper use of" a member's prices or merchandising plan was interpreted to mean selling at a lower price or on more favorable terms. The whole provision contemplated control over consumer prices and distributor margins in connection with mandatory discount schedules.

The brake lining division tried at various times throughout the code period to establish control over distributors, affiliates and jobbers by means of such written agreements, but was never completely successful. (*) The first classification for national and territorial distributors adopted in November 1933 prohibited sales to them until

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(*) Subsidiaries or affiliates of the manufacturer were included under Asbestos Code by the definition of industry in Article II, Section 5. Not all of the affiliates were owned or controlled by the manufacturer, but were rather private brand buyers, and regional distributors. Prolonged discussion between NRA and the code authority about the proper definition of subsidiaries and affiliates made their status as regards the code requirement somewhat uncertain and resulted in numerous shifts in treatment of them, as noted below

they subscribed in writing to the code and merchandising plan. (*)

On several occasions, and as late as June 1934, effective dates for buyers' agreements were set but were withdrawn in each case because of the impossibility of securing approval of the plan and the simultaneous application of the requirement to all resellers, under arrangements wthat would be mutually satisfactory to members using different channels of distribution.

About a month after the requirement was first put in operation, one large national distributor, national automotive parts and accessories, refused to accept the discount provided by the merchandising plan and succeeded in having the whole arrangement considered in a Public Hearing held by NRA, January 18, 1934. Inasmuch as NRA would not approve the discount requirement, the industry also abandoned for the time the attempt to enforce the contracts required by the merchandising plan. Members selling to jobbers were reluctant to bind themselves to required resale price maintenance agreements, so long as sales affiliates, regional distributors, equipment manufacturers and other were not also forbidden to sell to jobbers without contracts to maintain filed prices.

Throughout the code period members were particularly concerned with the possibility that the affiliates would get out of hand, and disregard the marketing practices and prevailing prices of the members of the industry, or would be used by some of the members to evade the price provisions of the merchandising plan. In several instances these sales affiliates marketed the entire production of several members and thus operated in a capacity similar to an owned sales organization. In general, it appears that the fears of the industry were unfounded and that except for low-priced popular products, which passed through several intermediate distribution steps, the list prices and discounts filed by the members of the industry were observed by the various classes of trade. During the early part of the code, before any dispute as to the definition of affiliates, they were considered members of the industry and filed their own prices and discounts to the various classes of trade. Later they were regarded as preferred customers and bound by agreements to observe the schedules filed by their suppliers.(**)

(*) The latter was not officially approved by NRA until August 8,1934, but except for the discount schedule was in effect from November, 1933.

(**) Divices Affecting Distributive Relations in the Brake Lining and Related Friction Products Division of the Asbestos Industry, a study by Clayton Gehman, Trade Practice Studies, Division of Review.

3. Provisions Permitting Members to Require Contracts from Distributors

Permissive price maintenance contracts were provided for by the Copper and Brass Mill Products Code as a means for preventing the breakdown of the open price structure. The provision reads in part as follows:

> Whereas, the great preponderance of sales by manufacturers in this industry is made without the intervention of distributors and the sale by distributors where such services are used, at a price less than the manufacturer's published price schedules would unfairly break down the open price structure provided for in Article V hereof, any manufacturer may enter into an agreement with a distributor by which such distributor may agree that he will sell the products purchased from such manufacturer at not less than the prices contained in the published price schedules of such manufacturer in effect at the time of any such sale. (*)

(*) Code for the Copper and Brass Mill Products Industry, Article VI., Codes of Fair Competition, As Approved, Government Printing Office, Vol. II, p. 295. (Underlining supplied)

The importance of this provision to the industry and its function as a corollary to the open price provision was set forth in detail in a statement of the code authority presented at the Hearing on Distribution Differentials, January 9, 1935. Declaring that the intent of the provision was identical with that of the price filing requirement - the prevention of discrimination among customers - the statement urged that such agreements were necessary to prevent distributors and their customers from obtaining an unfair advantage over the manufacturer and his customers.

> It is apparent that this provision is, in this industry, a necessary corollary of the open price provision of the code. The granting of secret discriminatory prices by distributors is just as objectionable as the granting of discriminatory prices by manufacturers, and it is just as productive of evil results in the industry.....The effect is the same whoever does it - the re-establishment of unusual treatment, and the resulting pressure for special favor from all customers.
>
> If a distributor were permitted to give discriminatory prices to certain favored customers or to lower prices to all customers below the prices charged by his supply-manufacturers, the probably result would be either a greatly increased production of sales through distributors, or the abandonment by the manufacturers of the open price provisions of their code and the return to the discriminatory practices which have heretofore been prevelant in the industry.(*)

A series of code authority resolutions pursuant to the distributor provision in this code were passed at the code authority meeting on January 24, 1934, after the first filing of prices on December 11, 1933. The most significant of these resolutions tended to make mandatory by boycott the permissive action authorized by the code:

> Resolved that manufacturers after March 1 shall not sell to distributors who have not signed the Distributors' Agreement.(**)

(*) Transcript of Hearing on Distribution Differentials, March 14, 1935, NRA files. Although emphasis is placed here on discriminatory prices, it should be noted that lower prices by distributors were generally condemed.

(**) This resolution and other date included in this section are drawn from Minutes of the Executive committee for the copper and brass mill products industry, for the dates indicated, These minutes are on file in the NRA files.

At this same meeting the counsel for the industry suggested the desirability of writing to the Southern Hardware Distributors Association suggesting that they obtain a modification of the decree previously imposed by the Department of Justice so that its member might be enabled to sign the distributors' agreements.

Some delay was encountered in putting the agreements into effect in the industry but action to that end was quite general and quite effective. It was reported at the meeting on March 30, 1934, (three and one-half months after the first date of filing) that only seven of the 34 manufacturers having distributors had followed the requirement of the executive committee in including on their price schedule a statement of policy concerning resale contracts. But even then a total of 3,375 distributor agreements (including many duplications) were reported as signed, with 541 cases in which agreements had not been signed. It was voted at that meeting that the secretary should ask members to submit a list of all distributors, and a further meeting to consider the distributor situation was called for April 12, 1934. At this meeting the executive committee was directed to compile records of the distributors to determine whether each one was carrying out his agreement. The committee confirmed this action at the meeting on April 27, 1934.(*)

On September 11, 1934, a new form of distributor agreement was recommended by the sub-committee on trade practices, which stipulated, in brief, that in consideration of receiving his trade discount, the distributor would undertake (1) not to consume the goods for his own or his affiliates use and (2) not to resell the goods at less than the schedules prices of the manufacturer filed with the Executive Committee.

At this same meeting a report was made on the status of the filing of lists of sales agents and distributors with the executive committee. This may throw some light on the extent to which manufacturers were cooperating in the effort to control distributor prices:

	Sales Agents	Distributors
Request for lists	52	51
Lists filed	33	25
Manufacturers having none	16	14
Manufacturers not yet filing or reporting	3	12
Total	52	51

On November 7, 1934, only three companies were reported as failing to file lists of sales agents in accordance with the executive committee ruling.

No later figures on the number or proportion of distributors signing agreements were found, but the report of the code authority at the hearing on distribution differentials, (**) would indicate a relatively successful experience in that respect.

(*) The minutes of the May meeting were not located in the files, so that the results of this compilation are not available.

(**) See page 290 above.

Some account of difficulties encountered in securing compliance with the agreements, and mention of a Federal Trade Commission inquiry concerning the price maintenance agreements, are contained in the Code History for the Copper and Brass Mill Products Industry.(*)

Violations of the agreement were apparently most flagrant in the metropolitan area of New York and occurred in the sale of brass pipe. Shortly before the termination of code activities, members of the industry cancelled their agreements in that area for the sale of such pipe.

The fact that distributors were really not subject to the jurisdiction of the Code Authority of the Copper and Brass Mill Products Industry but were members of the code for the Copper, Brass and Related Alloys Trade, made it necessary to rely on the manufacturer for enforcement of his own agreements. Upon the presentation of evidence of the failure of a distributor to maintain the prices of any manufacturer with whom he had an agreement, the code authority would attempt to find the member guilty of violation of Article IV, Section 2 of the Code, which required all manufacturers to "adopt and maintain fair and equitable uniform contract terms and conditions to be established by the executive committee" or else to interpret his neglect to enforce his contracts as evidence of an intent to evade price schedules by subterfuge.

It would appear that the joint action of members of the industry in seeking to enforce contracts binding distributors to maintain manufacturers' prices was in all probability "restraint of trade" within the meaning of the Federal Trade Commission Act, since the code provision as approved was permissive to individuals and was not mandatory. Certainly the resolution to boycott non-signers went beyond the authority granted in the code. The Code History reports that an examiner for the Federal Trade Commission called upon the deputy administrator in charge of the code for information relative to the contract agreements, because a complaint alleging resale price maintenance without code authorization had been filed with the commission. No report of the Commission's findings was made to the Deputy prior to the termination of the code.(**)

In this connection, as with enforcement of compliance cases cited to the NRA compliance division, the permissive character of the authorizing provision might have had significant import, but as a matter of practical operation within the industry it was little different from the mandatory requirements cited in the previous section, and was apparently even more successful.(*)

(*) Page 141 .

(**) Code History, p. 141.

(***) The Gasoline Pump Industry Code, Amendment 1, also provided for permissive contracts.

4. Provisions Forbidding Members to Sell to Distributors Not Conforming to Trade Practice Provisions, or Non-Cooperative.

The increasing reluctance of NRA to admit resale price maintenance clauses into codes may account for a number of vague code provisions designed to accomplish by indirect means the control of distributors' price quotations in accordance with manufacturers' filed prices. The business furniture industry was one case in point. The fire extinguishing appliance industry and the carpet and rug industry code provisions likewise imposed obligations on manufacturers, without affording any clear basis for enforcing that obligation.

The Fire Extinguishing Appliance Code (No.98) Article VII, Section 11, page 7, entitled Destructive Marketing, prohibited as an unfair method of competition

> Continuing to supply any trade factor whose practices are duly proved to be destructive of the market at prices which enable him to continue destructive marketing.

The code elsewhere provided for the establishment, subject to NRA approval, of definitions of trade factors and appropriate differentials for the declared purpose of preserving "stability in the primary and secondary markets." It may be assumed that this was also the intent of the section quoted above.(*)

"Destructive marketing" to distributors was interpreted by the code authority to mean deviation from the list prices filed by manufacturers. Bulletin announcements required, among other things, the use of uniform resale contracts and the filing of distributor agreements with an impartial agency. It was voted on March 10, 1934, to limit distributors per manufacturer per state to six, with a total of 85 jobbers or distributors for any one manufacturer. The requirement that destructive marketing be"duly proved" was evidently not interpreted by the Code Authority to require submission of proof to the NRA, for there is no record of any case being considered, although threats of prosecution for code violation were reported to have been used to secure compliance.

The assistant deputy, under date of May 9, 1935, alluded in a letter to the code authority to the efforts of the industry to control the selling activities of distributors through requirements that manufactures' filed prices be maintained. On May 13, 1934, the General Fire Truck Corporation wrote to the assistant deputy administrator of the code asking whether manufacturers had the right under the Fire Extinguisher Appliance Code to insist upon a jobber or dealer maintaining the retail prices which had been established by filing with the code authority. The deputy replied on May 17, 1934 with the statement that resale price maintenance was not sanctioned by any provision of the Code. He indicated that Article VII, Sec.11 (quoted above) forbade a manufacturer to

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(*) See p. 251 above for further account.

continue to supply a jobber or dealer whose practice was destructive at prices permitting destructive practices "only upon the official finding by N.R.A. that factual evidence revealed the actual existence of such a condition."(*)

A complaint filed with the Federal Trade Commission on April 4, 1935, charged collusive price fixing, and alleged that members of the industry were refusing to sell to jobbers who would not agree to maintain resale prices. The Code History for the Fire Extinguisher Industry indicates that this boycotting of recalcitrant distributors was not uncommon, and that if effectively ended their activity in cutting prices.(**)

Article VII, Section 1 of the Code for the Carpet and Rug Industry stated that:

> Inasmuch as the members of the Industry control a preponderant share of the distribution of carpets and rugs to retailers and consumers, which distribution is to be governed by the following trade practices, it shall be an unfair trade practice for any member of the industry to distribute through intermediate channels in such a manner as shall create unfair competition as defined in Articles VII, VIII, and IX with members of the Industry distributing direct to the retailers and consumer.

The price filing requirement is included in the above prohibition in Article VII. This provision was interpreted by the Code authority to require resale price maintenance by wholesalers, thereby preventing them from giving more favorable prices to retailers than were allowed by manufacturers selling direct. This interpretation was enforced by the practice of allowing to approved wholesalers a functional discount from the base price quoted to retailers, while limiting the latter to the general discounts based on volume allowances to both wholesalers and retailers which were, according to the Code, to be filed at the beginning of the season, with the agent of the code authority. Despite the efforts of manufacturers to eliminate price competition from wholesalers and at the same time to protect their differential, occasional complaints indicated that certain wholesalers continued to grant more favorable discounts to retailers than were granted by direct sellers. But the plan was successful enough to cause charges of price-fixing and of the maintenance of uniform list prices and discounts to be made by the National Retail Dry Goods Association. These charges were later docketed with the Federal Trade Commission for investigation. Such price control as was maintained obviously depended to a large extent on

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(*) Letters, of dates indicated, between Assistant Deputy Administrator Hand and General Fire Truck Corporation, NRA files.

(**) Pp. 54, 65.

the combination of open filed prices (plus a seven day waiting period) and the resale price maintenance requirement read into Article VII, Section 1, quoted above.(*)

5. Requests for Code Amendments or other Sanctions to Bind Distributors to Filed Prices

Several industries, faced with the problem of secret competition from distributors, brought complaints to the NRA or asked remedial action in the form of interpretations or amendments. The records do not always indicate to what extent these industries had tried to help themselves before appealing to the Administration. Many of these appeals came during the later months of NRA and resulted in no definitive action pending decisions on contemplated code revisions after June 16, 1935.

The Code Authority for the Mayonnaise Industry proposed early in 1935 an amendment to Article X of their code, which would require manufacturers to secure contracts from dealers, alternatively binding them to file prices or to observe their suppliers' prices. The provision, which was considered at a Public Hearing on April 12, 1935, read in part as follows:

> (a) Inasmuch as 69% of the products of the Industry is sold by members...direct to retailers, and the remainder is sold to non-members for the purpose of resale to retailers, therefore, in order to further carry out and safeguard the principles of open price competition, any sale of the products of the industry to a trade buyer other than a retailer shall be made by the member under a contract whereon such trade buyer shall agree either to resell such products in strict accordance with the current price list filed with the Code Authority by the member selling such trade buyer or to resell in strict accordance with his own price list which shall have been filed with the Code Authority by such trade buyer in accordance with and following the procedure provided for members, of the Industry in Section 1 and 2 of Article X.
>
> (b) Such contract shall further provide that said trade buyer shall not make or permit to be made (underlining supplied) any direct or indirect price concession to retailers. Said term 'direct or indirect price' means variation from the current price list governing the sales of such trade buyer and then on file with the Code Authority whether by means of a rebate, brokerage refund, credit concession, allowance, payment, special service free deal, gift or any other means whatsoever.....

(*) The records examined do not indicate that this provision was ever officially interpreted by NRA.

The amendment would have provided further that all industry members must complete the placing under contract of trade buyers within thirty days after the effective date of the amendment.

The controversies over this proposed amendment were bitter and it was never acted upon by the NRA. The code authority, in Release No. 47, issued in March, 1935, defended it on the grounds that it would prevent destructive price cutting by a few distributors, "a condition which has long retarded this industry from securing the full benefit of cost recovery-----"

When questioned at the Public Hearing as to the intent and possible effects of the amendment, Mr. W. F. Tuttle, Chairman of the Code Authority, denied that there would be resale price maintenance or price-fixing so long as distributors were free to file their own prices, and said that the proposal was designed only to carry the open price system to its logical conclusion. An essentially similar provision in the pasteurized and processed cheese industry, which had been approved by the NIRB after consideration by the Advisory Council, was cited as a precedent for the provision by the Advisory Council, was cited as a precedent for the provision.

The U. S. Wholesale Grocers Association filed a brief opposing the amendment, claiming that it provided, in effect, for resale price maintenance. The National Food and Grocery Distributors also objected, stating they could not see the reasons "for requiring wholesale grocers to file their resale prices under the Mayonnaise Code as wholesalers (if this alternative be chosen) unless the purpose is to boycott such wholesalers as do not sell at prices dictated by the manufacturers."(*)

Other opponents of the amendment, including M. R. Pearsall of the B. F. Pearsall Butter Co., Elgin, Ill., protested that the amendment would work to the detriment of the small men by eliminating entirely the possibility of the small manufacturer selling new jobbers or wholesalers after the latter had been contracted by manufacturers of nationally-known brands.

> The large manufacturers have representatives in all sections of the country. They are better able to contact and to contract their distributors and can do it more quickly than the rest of us--They (wholesalers) are not willing to contract themselves so they or we will be fined if there is any deviation for any purpose.(**)

In general, it appeared that the manufacturers and distributors of leading brands were in favor of the amendment while others were not.

(*) Transcript of Public Hearing on Proposed Amendment to Mayonnaise Code, April 12, 1935, pp. 94 ff. NRA files

(**) Ibid.

Although the amendment was still pending at the time of the Supreme Court decision, it was apparent that the deputy administrator in charge of the code was not in sympathy with the proposal. In one memorandum, dated April 15, 1935, he referred to the amendment as an attempt on the part of the manufacturers to legislate for distributors, which he did not believe could be legally done, and as a type of provision which would centralize power into the hands of the manufacturer in such a way as to permit monopolistic practices, if such were desired.(*)

Evidently the proposal to extend control over distributors by means of this amendment was resorted to by the mayonnaise industry only after the failure of former efforts to control through the customer classification provisions of the code.(**)

The valve and fittings industry has, in its early code proposals, submitted a provision setting forth a resale price maintenance policy as an accompaniment to defined customer classes and fixed trade differentials. Neither the resale price maintenance nor the fixed differentials were permitted in the approved code.

After more than a year of code operation, with various attempts to stabilize the price structure in the primary and secondary markets of the industry through price filing and customer classification, the code authority on January 31, 1935, authorized the chairman to appoint a committee to develop a contract plan with distributors. This committee, called the Producer-Distributor Relationships Committee, was appointed on February 7, 1935, for the purpose of establishing rules and regulations for the sale of products of the industry in the secondary market. The committee worked in cooperation with a group of distributors(***) and worked out a plan which would have provided for a contractual relationship between producer and distributor, with a price schedule attached to indicate the producer's direct selling price for these products to those in the secondary market. Distributors were under the proposed plan to require similar contracts from those resellers to whom they sold. A report of this committee was scheduled for presentation at the meeting of the code authority on May 23, 1935, but the plan was never forwarded to the Administration.(****)

(*) Memorandum from Deputy Administrator Irvin Moise to Assistant Deputy L. S. Dame.

(**) See pp. 245-247 above for details of these efforts.

(***) The group is not clearly identified but was presumably the Vavle and Fittings Committe of the Central Supply Association, which had previously complained of the discounts given them by manufacturers, and that distributors were not accorded prices more favorable than those to government agencies. Meetings were held on March 18, 19, and 29, 1935.

(****)Code History of the Valve and Fittings Industry, Division of Review, p. 39.

3. Extra-Legal Attempts To Bind Distribution to Filed Price

Many of the efforts at distributor control cited in preceding sections have exceeded the grant of power contained in the code, but they have all derived in some degree from interpretations of code provisions. In the absence of official NRA determination in particular instances, it is not possible to indicate with any degree of finalty just which activities were illegal extensions of code powers. For that reason, the examples were grouped in accordance with the ostensible enabling provisions of the code, even though supplementary code authority activities would not be justified by them.

There remains a further group of examples of attempted distributor control that do not fit any of the above categories, and depend very slightly, or not at all on explicit code sanctions. In some instances they were patently extra-legal. In other instances, they were achieved by cooperative tactics in connection with price filing, but not clearly contrary to the code.

Thus, the fertilizer industry succeeded "by voluntary action" on the paat of producers in connection with their filed price schedules in substituting in each sales territory except one the commission agency system for the independent dealer system. By this means, manufacturers were able to control their resale prices, and effectively to eliminate price competition from their dealers. This change was accomplished largely by vote of regional committees (authorized in the code to recommend to the code authority uniform marketing practices for submission to the NRA) and was then put into effect by a series of revisions of price schedules, following a process akin to price leadership. Approval of these recommendations by NRA was not asked, nor did it appear necessary to effectuate the action agreed upon through industry vote. The secretary of the code authority attributed the change largely to the example of one dominant producer who quoted prices delivered-to-the farm, and to the desire of manufacturers to eliminate the alleged practice among distributors of playing one manufacturer against another for better discounts, without passing on the resulting saving to the ultimate consumer.

The explanation of the process of change is plausible enough and in keeping with the observed price revisions. But the obvious purpose of the change, and its necessary result, was to establish complete control over dealers' prices and to maintain the price schedules filed by producers. This change admittedly facilitated the administration of the price filing plan and contributed to the desired price stabilization for the industry.(*)

The gas appliance industry attempted in various ways to extend price filing control over jobbers and distributors first by declaring them subject to the code and its price filing requirements, and then by industry boycott of distributors not willing to abide by manufacturers' filed prices.

(*) For reference see Division of Review, Preliminary Report on the Fertilizer Industry by A. F. O'Donnell, Summary p. xix and The Study of Price Filing in the Fertilizer Industry, by Simon Whitney.

The code as approved on November 27, 1933, defined the industry to include manufacturing, assembling and "Selling of...appliances to retailers, wholesalers and consumers, but not including selling at retail." Original instructions for price filing were issued in rules established at the meeting of the code authority on December 4, 1933. These were bulletined to the industry on December 8, 1933. They made no mention of filing by distributors, or jobbers but referred generally to employers engaged in the "manufacture and sale" of specified products. Bulletin No. 13, entitled Distributors and Jobbers, was issued March 2, 1934. It declared that distributors and jobbers were specifically included as part of the code and were "required to file prices" and otherwise to comply with all its provisions.

The bulletin continued further by asking each manufacturer to furnish the code authority immediately with the names of all wholesalers, distributors and jobbers through whom he distributed, and asked jobbers "to cooperate with the committee as their code authority." Those who questioned the propriety of the request were invited to consult NRA officials, specifically the chief of the Classifications Section.(*)

This bulletin was, according to the code Administration Study of the Gas Appliances Industry, based on an unwarranted interpretation of the industry definition. (**) This opinion was shared by the author of the Code History, who stated that distributors and jobbers of gas appliances did not participate in the formulation of the code,,and that the Gas Appliance Institute, which presented the code was truly representative only of manufacturers.(***)

The Metal Window Industry Code, as approved on January 13, 1934 defined only one class of resellers under the term "dealer." At the January 23, 1934, meeting of the code authority, definitions of two classes of "distributors" were approved by the code authority and a ruling was passed requiring manufacturers to file lists of such distributors, together with affidavits from each sales outlet so classified, such affidavits to include:

(*) Prior to this, the committee had passed a resolution on February 14, 1934, that prices filed by manufacturers of gas water heaters should be distributed to manufacturers only and that prices filed by jobbers and distributors should be distributed to jobbers and distributors only. Apparently some jobbers and distributors had already filed and the bulletin was meant to improve compliance. No record of a ruling by the Classification Division was noted.

(**) Code Administration Study of the Gas Appliance Industry, by A. B. Fridinger, Research and Planning.

(***) Code History, page 151 of first draft, incomplete on February 1, 1936, See page 245 above, for description of attempted control of distributors' behavior through customer classification provisions.

> ".....agreements to maintain all provisions of the industry code so far as concerns the observance of published schedules issued by his principal. These affidavits shall be renewed at the end of each calendar year."

In a later ruling, issued in the code authority bulletin of March 6, 1934, it was declared that "dealer-agents" took the same status as direct employees, and must adhere to the trade practice provisions of the code which forbade the sale of industry products on terms more favorable to the buyer than the published discounts of the manufacturer. This ruling was reiterated in a later bulletin, dated April 18, 1934. Inasmuch as this ruling on the status of dealers exceeded the provisions of the definition, it was repudiated by the Assistant Deputy Administrator in charge of the Code in a letter to the code authority on July 18, 1934. This letter stated.

> "It was the unanimous opinion of the advisers that the ruling....is incorrect and should be withdrawn. The advisers believe that when a dealer purchases manufactured products, takes title to them, and assumes credit risks in connection with resale, all control of the products passes out of the hands of the manufacturer, and that the manufacturer therefore, so far as the code is concerned, cannot control resale prices. Under the above conditions, the so-called Dealer-Agent is not a member of the Metal Window Industry and is therefore not subject to the provisions of the Metal Window Code."(*)

The Vitrified Clay Sewer Pipe Code contains no resale price maintenance clause.(**) Yet approximately three weeks after the code was approved, D. M. Strickland, Manager of the Vitrified Clay Products Institute, addressed a letter to jobbers and wholesalers, reading in part as follows:

> "Gentlemen: On Dec. 8 I sent you a copy of the Code of Fair Competition for the Vitrified Clay Pipe Manufacturing Industry.
>
> "Today I am sending you provisions which govern the resale of this Industry's merchandise. Though mandatory, the provisions are only common sense, and are

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(*) Letter from R. M. Searle, Assistant Deputy to B. H. Sartor, Secretary Code Authority, 7/18/34 NRA files.

(**) In Article VII, sec. 15, the power is given to regional committees, subject to review and modification or disapproval thereof by the Administration, whereby contractors', dealers' or jobbers' discounts will not be extended to those who do not perform the functions of contractors, dealers or jobbers--as well as a provision in Article XIII, Sec. 3, that members, shall not "sell directly, through affiliated company or otherwise deviate from filed prices.

divided to insure clean, healthy marketing in the Eastern Region of the sewer pipe manufacturing industry.

"Read these provisions carefully. Your cooperation is expected. Note especially:

1. Jobbers cannot sell below their suppliers' published price. This published price is on file in this office. However, you are expected to get your instructions from your manufacturers (underlining in original.)

"2. Terms of compensation are mandatory. (See Article XI of Code) (This article provides that terms are subject to NRA review.) Do not ask your manufacturer to change the terms. He cannot without code violation.

"3. Steps are to be taken on the establishment of an official jobbers' list.

"4. Misconduct on the part of jobbers is inadvised and carried penalties which the manufacturer will respect, otherwise be violating the code.

"A word from you indicating cooperation with the manufacturers under the provisions and regulations of their code would be timely and wise.

"This office would be glad to review any confidential information you care to send concerning your sales force, volume, market or territory. It is not mandatory that you do this, but it would be helpful and furnish this office with first-hand information concerning the sales capacity of various firms representing this industry. By confidential, I mean whatever you write will be held inviolate in this office and in no instance mentioned to any other jobber, to any manufacturer, or member of the Regional Committee or Code Authority...."

Action to boycott dealers not cooperating with manufacturers was taken at the meeting of the eastern regional code authority on January 17, 1934.

The minutes contain the following resolution No. 39: "Resolved that no manufacturer shall quote or sell, continue to quote or sell, or commence to quote or sell, any dealer who has been listed as non-cooperative, any jobber who has been removed from the preferred list because of misconduct convincing to the Regional Committee or its agents. Among other acts of misconduct are:

a. Selling at better terms than 30 days to consumer.

b. Selling at prices less than the manufacturer's posted price.

c. Diversion of any car or other subversive practice in an effort to place cars in the dealers' yards or elsewhere at less than published prices or at better than published terms."

Resolution No. 47 was passed on March 21, 1934, and reads as follows:

"Resolved that the following be accepted as definition of a dealer:

"'Dealers in this Industry are firms, persons, or corporations who adequately stock and definitely promote and sell vitrified clay sewer pipe and kindred products to contractors and consumers generally. Legitimate dealers should be financially responsible and reasonably able to discount their bills. The policy and course of the dealers in promoting vitrified clay sewer pipe against competitive materials must be constructive and cooperative with sources of supply. Dealers perform the time and place function in this Industry!" (*)

At the meeting of the eastern regional code authority on April 4, 1934, the motion was made and unanimously carried to require pledges of cooperation from all recognized jobbers:

"Resolved, that the secretary and the manager be instructed to mail the following pledge of cooperation to all jobbers now recognized in the Eastern Region of the Vitrified Clay Sewer Pipe Manufacturing Industry. The secretary and the manager are instructed to secure signatures to the pledge. If necessary, the secretary and the manager will ask the sponsor of any individual jobber to assist in explaining to his jobbers the desirability of complying with the industry's request. The secretary and the manager are instructed to report to the regional committee any firm, person or corporation which neglects or refuses this evidence of cooperation."

"To the Regional Committee of the Vitrified Clay Sewer Pipe Manufacturing Industry. Date_____

(*) These two resolutions were rescinded by the eastern Regional committee at its meeting, June 18, 1934, at the request of the administrator.

Gentlemen: Recognizing that it is the opinion of manufacturers in the Eastern Region of the Vitrified Clay Sewer Pipe Manufacturing Industry to extend jobber's compensation to various firms, persons, and individuals who perform sales services and sales functions, and
Recognizing that when the undersigned accepts the jobber's compensation it is with the understanding it will be earned, and
Recognizing that the sale of vitrified clay sewer pipe and kindred products is only possible profitably when there is close cooperation and mutual interest between jobbers and manufacturers;

The_____Company, for the period during which it is sold at jobber's terms promises support to its sources of supply and herewith, pledges the following:

"A. To quote or sell at terms no more favorable than those established by the Eastern Regional Committee and the manufacturers of the Eastern Region of the Vitrified Clay Sewer Pipe Manufacturing Industry, - such terms, in reality being mandatory under the Sewer Pipe Code, Art. XI.

"B. To quote or sell at prices no less than those posted by the sources from which the pipe was brought, the undersigned reserving the right to purchase from one or more manufacturers and to change his sources from time to time as conditions warrant.

"C. To meet the credit terms of the Industry.

"D. When selling dealers, to be guided by the following definition and under no circumstances sell contractors or fly-by-night outfits at dealer terms:

> 'Dealers in this industry are firms, persons, or corporation who adequately stock and definitely promote and sell vitrified clay sewer pipe and kindred products to contractors and consumers generally. Legitimate dealers should be financially responsible and reasonably able to discount their bills. The policy and course of the dealers in promoting vitrified clay sewer pipe against competitive materials must be constructive and cooperative with sources of supply. Dealers perform the 'time and place' function in this industry.'

"E. To promote the interests of the Vitrified Clay Sewer Pipe Industry and to help the Industry in any legitimate sales campaign directed toward competitive products other than vitrified clay.

"Firm:_____

"By:_____

Although the Vitrified Clay Sewer Pipe Code provided for NRA review of all rules and regulations, there was apparently no action taken to discourage these activities until complaint was made by the Delaware Clay Company of Pittsburgh, Pa., that it had been suspended from the jobbers' list, and that manufacturers had been forbidden, on pain of code violation, from accepting orders or making shipments to the concern on jobbers' terms.

A wire was sent from J. P. Lynch, Assistant Deputy Administrator to J. M. Byrne, Secretary of the Eastern Regional Committee, dated May 23, 1934:

"AFTER CONSULTATION WITH LEGAL ADVISERS BELIEVE ACTION OF EASTERN COMMITTEE IN REMOVING JOBBERS FROM LISTS BECAUSE OF FAILURE TO MAINTAIN MANUFACTURERS PRICE TO BE UNAUTHORIZED BY CODE STOP IF JOBBERS TAKE TITLE TO MATERIAL COMMITTEE WITHOUT AUTHORITY TO GOVERN RESALE PRICE STOP IF JOBBER IS AGENT AND TITLE REMAINS IN MANUFACTURER THEN MANUFACTURER AND NOT JOBBER IS GUILTY OF VIOLATING CODE AND COMMITTEE HAS NO RIGHT TO TAKE ACTION AGAINST JOBBER STOP SUGGEST ANY ACTION OF THIS SORT TAKEN BY COMMITTEE BE RESCINDED IMMEDIATELY TO PREVENT SITUATION ARISING FOR WHICH WE COULD NOT UPHOLD REGIONAL COMMITTEE."

This attitude on the part of the Administration led to bitter protest from the industry and an indication that without such requirements it would be necessary to eliminate the jobbers or to forfiet the advantages of price filing and other regulatory devices.

The following are excerpts from a letter of May 24th, 1934 from J. M. Byrne to J. T. Lynch, in reply to the above night letter:

"Your night letter of May 23, 1934, received here today brings to a head the most important issue of the Eastern Region of the Vitrified Clay Sewer Industry. It is so vital, that if we do not have the support of the NRA for a position that is evidently sound and reasonable, we shall have to make drastic changes eliminating the so-called jobber in his present form.

"We cannot help feeling that only one side of the question was presented to the Legal Division. When the other side is offered, and the Legal

> Division understands the irresponsibility of the jobber in this Industry, it will also perceive that to comply with the request contained in your wire would be to destroy all of the constructive accomplishments in this Industry by NRA and to make inevitable for it a relapse into demoralization and ruin.

The following are excerpts from a letter of May 26, 1934, from J. T. Lynch to J. M. Byrne in reply to the above:

> "As the matter has been presented to us, the case is one involving an effort on the part of the manufacturer to control resale price of their material. There are two reasons which made it necessary for me to wire you as I did, which reasons are as follows: (1) there is a policy ruling which is definitely against the control of resale price by manufacturers; (2) in the opinion of the Legal Division, there is no authority in your code for such control.
>
> "The case which particularly concerns me at the moment in that of the Delaware Clay company, of Pittsburgh, Pa., who claimed to have been eliminated from the jobbers' list because they inadvertently quoted a price which was only $2.00 below the manufacturers list price in an order amounting to about $400. I have heard only one side of this case and am, of course, reserving judgment until the other side has been heard."

Subsequently, June 18, 1934, the resolutions 39 and 47 were at the insistence of NRA, withdrawn by the Regional Committee. Nevertheless, there is evidence that the attempts at control were not abandoned.

In repeated resolutions, attempts were made to regulate delivery terms, the conduct of jobbers, uniform terms of sale, checking of invoices, the rejection of incomplete filings, etc. Many of these were rescinded at one time or another because of NRA objections. Eventually, at a meeting of the eastern regional committee on January 22, 1935, the following resolution was unanimously adopted on roll call:

> "Resolution No. 69, Resolved, That, pursuant to Article VI, Paragraph 6(c) and pursuant to Article VIII of the Code of Fair Competition for the Vitrified Clay Sewer Pipe Manufacturing Industry, it is recommended that all manufacturers independently file schedule No. 1 as the minimum factory yard price, regular terms to apply, with no freight allowance of any kind to any class of buyer."

All the events leading up to this action cannot be detailed chronologically, partly because of lack of space, and partly because the records

from resolution No. 1 to resolution No. 69 are not complete. But excerpts from a summary account given by the manager of the regional code authority at a meeting on November 27, 1934, and detailed in the minutes of that meeting, offer such a graphic pattern of an attempt to apply controls to distributors through the ostensible means of price filing, that they are reproduced here without much attempt to explain or comment on the actions alluded to by the manager.

Comments on the general subject of code compliance were invited from Mr. D. M. Strickland, Manager. He began with the assertion that the administration of the code in that region had, by comparison with other codes and other industries, been decidedly efficient, and attempted to prove it by asking four questions. The first pertained to the complete absence of complaints regarding wage or hour violations, of which there were declared to be "Not one. Not even the suspicion of one."

The next three questions pertained to compliance with open price filing:

> "2. How many manufacturers refused to file prices pursuant to Article XIII? Not one. And many and many a code is in the last stages of disintegration as far as price filing provisions are concerned simply because one or more pig-headed minority interests would not conform to this important provision.
>
> "3. With almost all of our products bought by Government agencies, what manufacturer has ever cut the price up to the optional 15 per cent allowance? Not one. There is a silent definite testimony to the basic desire on your part to do sensible things.
>
> "4. How many open and shut defiant violations have there been to Article XIII of the Code where a manufacturer refused to pay any attention to his filed price? Practically none. No manufacturer has ever said to me, 'Yes, I cut the price, what are you going to do about it?' Only three or four complaints have been filed against manufacturers on this type of violation and in every case an effort has been made by the respondent to discuss this question on its merits and not in a defiant arbitrary manner."

Maintaining that the code was a "well accepted article for agreement among manufacturers," Mr. Strickland placed the entire blame for "trouble" on distributors or "out in the market," after the goods begin to move out of the manufacturers' control.

> "We run into most of our difficulty when the goods start through the jobber, to the dealer and to the consumer.
>
> "First of all the industry tried to control the jobber by mutual consent. This worked for a while and then collapsed when the NRA ruled against the efforts of your hired

men and your Eastern Regional Committee to control the jobber by the elimination of any jobber in case of violation. Then we rushed to Washington and took care of part of this trouble by winning acceptance to resolutions which declared direct shipments through a jobber, because we do not ship in his name, remain the manufacturer's property until they reach the dealer or consumer. Thus the jobber cannot take title and therefore if he cuts his price, it is a violation for the manufacturers to ship the pipe.

"Today, therefore, I will file and prosecute a complaint against any manufacutrer who ships through a jobber who has cut the manufacturer's resale price or passed on part of his remuneration. And hereafter, without any intent to challenge you, and with full realization that 85% support of the industry is absolutely necessary, I will continue to file and prosecute any effort of any manufacturer to ship through a jobber, if the jobber has cut the manufacturer's price.

"Then the question of commission salesmen popped into the picture. Some of these were obviously appointed for the sole purpose of circumventing healthy merchandising. Some of these were connected with dealers, some were 'busted' jobbers, some were purchasing agents, etc. At last, Resolution No. 68 was passed to regulate such obvious foolishness. As a result a manufacturer who illegally ships on an order from a commission salesman will find me filing a violation and prosecuting it.

"More recently, the dealer situation has seriously jarred our marketing. How can we influence the dealer to do healthy things? Here we run into two or three different manufacturer's opinions.

"1. If we cannot get the dealer to cooperate with us, our case is hopeless and we might as well go to demoralization at once.

"2. The dealer should cooperate, but in spite of any effort it seems like a problem which is unsolvable.

"3. We should not try to cooperate with the dealer. Let him do as he pleases - to hell with him.

"In spite of these various opinions, I stand right where I stood from the first, which is, until this industry be common consent or by Code law if procurable or by processes of education, can and does in a practical manner influence the resale of its products, it puts a premium on chicanery, chiseling, dummy dealers and rebates, and you will always be at the mercy of lying, gossiping, small minded jobbers who will drive you to sales demoralization over and over again.

"Little by little over the past months this demoralizing process has been developing. Almost all the pink slips were dealer quotations, followed by the aiding and abetting of the manufacturer who would ship on the technicality that he was not in violation of the sewer pipe code.

"At first we relied on the common sense of the manufacturers' and the dealers' codes. Both have had enough loop-holes to be inefficient. The dealer code finally had to be rewritten and one by one the manufacturers to protect their own interest, elected to start shipping through to an unrestrained dealer until today we are almost torn limb from limb, as witness the New York market.

"Previous to the present dealer code (under which now all dealers must file a price.)" (*)

"The Sewer Pipe Manufacturers endeavored to cooperate constructively with the dealer's nodal mark-up. Pursuant to Article XI (the nodal mark-up) the spread was increased from 5% of the net, inasmuch as this approached the 12½ dealer nodal. Then to help solve the delivery problem and avoid the use of such preposterous figures as.000000001 of a cent per foot, you adopted the resolution establishing 2 points of the list for delivery.

"The jobbers and dealers have decided this is too great an allowance and are giving it away in increasing volume. New York dealers give us the most flagrant example.

"At first blush the answer seems simple, just take away the 2 points, etc. However, this is only scratching the surface. The fundamental challenge is, can the industry influence its dealers to keep the remuneration for themselves - whether this is 2 points, 1 point 5% or what. If not, the only two avenues open are:

1. Eliminate the dealers, or
2. Content yourself to periodical demoralization from concerns which have no money invested in your business.

"Recent developments of the Builders' Supply Industry Code and recent rulings of Legal Counsel in the NRA Compliance Board suggests positive steps which can be taken in our behalf."

Mr. Strickland then proceeds to show how the open price plans of the two codes could be used to solve the problem.

(*) This is the Builders' Supply Trade Code which was amended in October 25, 1934, to incorporate Office Memorandum #228.

"Under the dealers' code all dealers must now file prices. Any dealer who bids without filing, violates his own code. It will be the duty of my office to protest any such violations. For example: If a dealer has not filed he cannot furnish certificate of compliance. I will get a ruling from Colonel Rose that the dealer is in violation then go after the Washington and State officials to prevent award and shipment.

"As an example, let us use a manufacturers' filed delivered price to the consumer net of $1.225 per foot on 18"3' double strength pipe in New York City.

"1. If the manufacturer's bid is less than $1.225 it is a violation of the sewer pipe code.

"2. If the manufacturer's commission salesman's bid is less than $1.225 it is violation of the sewer pipe code.

"3. If the bid of an independent sales agent or jobber who ships direct is less than $1.225 it is a violation of the sewer pipe code.

"4. If the dealer is the bidder and has not filed a price, it is a violation of the Builders' Supply Industry Code.

"Now suppose we have a case where a dealer has filed (underlining by author) and his filed price is less than $1.225 per foot and he uses this price in his bid. There are two courses of action.

"First, I will protest under the Builder's Code, Article IX, Section 2, Paragraph i, where it reads as follows:

> 'Wilfully destructive price cutting is an unfair method of competition and is forbidden. Any member of the Trade or of any other trade or industry or the customers of either may at any time complain to the Code Authority that any filed price constitutes unfair competition as destructive price cutting imperilling small enterprise or tending toward monopoly or the impairment of code wages and working conditions.'

"In orther words, in addition to working with the Builders' Supply Industry Code, I will also file, pursuant to this Article XIII, Paragraph 3, a violation against any manufacturer who has permitted his goods through an affiliated company or otherwise to reach the consumer at less than his NET consumer posted price.

"Remember, I use $1,225 as an example. It is the present 2 points to the consumer, 2 points for trucking, and 5% of

of the MET. If you reduce this, the case is no different in principle. I am not personally advocating $1,225. The spread is up to you, but its maintenance, whatever it is, is a code matter.

"Also, as time goes on, we are learning how to proceed with complaints. There has been confusion in connection with complaints and probably always will be some confusion. However, there is a spirited desire on the part of the NRA to do something positive about violations. This has become more evident as time has gone forwarded.

"The steps usually taken in connection with the filing of a complaint are as follows:

"1. On general complaints, I will notify all manufacturers by means of the pink slips we have been using heretofore. Hereafter they will be just as definite as possible with full instructions as to what not to do.(*)

"2. On specific complaints, I will notify the respondent and permit him to use ten days for return of his answer unless the emergency of the situation seems to indicate ten days should not be allowed. (For instance, suppose pipe is shipped just as rapidly as possible during this ten day period, etc.)

"3. If violation has occurred, I will file the facts in the matter to Washington at once, seeking to prevent award of the pipe or cancellation of the contract.

"I will write Colonel Rose (**) stating any figure filed and used by the dealer less than $1.225 jeopardizes the wage and hour provisions of our Code and no manufacturer can bid direct and meet this without filing down and this endangers our wages and hours, etc.

"This will result in either bringing the dealer up to $1.225 - or establish a reasonable cost which will be the logical spread we can adopt and fight for in event we cannot show cause that $1.225 is a minimum below which it is wilful price cutting.

(*) The meaning of these pink slips could not be definitely checked. The implication is one of boycott, or similar joint action.

(**) At that time Secretary of the Builders' Supply Code Authority.

"In addition to protection under the Builders' Code and pursuant to an interpretation of our own code given me last week from Washington through the Compliance Board of New York State, I can file complaint against any manufacturer who elects to furnish (or permits his pipe as already bought to be furnished) a dealer who had bid less than $1.225 - and this is pursuant to Article XIII, Section 3 of our own code, as follows:

> 'No member of the industry shall sell directly or indirectly through an affiliated company or otherwise by any means whatsoever any of the products of the Industry at a price lower or at discounts greater, or on more favorable terms of payment than those provided in his current net price and/or price lists and discount sheets, so filed with the committee as aforesaid; provided, however, that at any time any member of the Industry may meet the lawful price, meeting of a lower price must be reported at once to the Committee. An "affiliated" company the majority of whose voting stock is owned or controlled by a member of the Industry.'(*)

"4. If it is a dealer complaint I will handle with Colonel Rose in just as efficient a manner as possible.

"5. Copies of complaints will go to the Code Secretary (Chicago offices) as a matter of form and Code law.

"6. During period of investigation every State purchasing Agent, Colonel Rose, and other buyers who may be interested, will be informed that a manufacturer is in alleged violation . The Builders' Supply Industry Secretary will notify dealers than an alledged violation is pending against the manufacturer is question.

"7. If it is determined a violation has occurred, all interested will be notified that the complainant cannot file a certificate of compliance. Incidently the dealers' code now says:

(*) The Interpretation of this section should be contrasted with the one made under similar circumstances in the Business Furniture Code which set in motion the breakdown in resale price maintenance activities in that code, and the attempts to secure them by amendment. See p 276 .

'No member of the Trade shall handle any builders' supplies which have either been manufactured or sold by a vendor who does not represent that he is in full compliance with the approved code of fair competition, etc.'

"Let me repeat: the action described above is not offered defiantly. It is not a challenge asking a manufacturer to resist common sense. But is a declaration that this office will devote just as much time as is necessary to the end that compliance administration will be justly and impartially administered."

The meeting of the eastern regional code authority February 12, 1935, was largely devoted to the compliance problem in the New York marketing area, where price cutting by dealers was allegedly menacing the "economic opportunity of the industry."

It was tentatively suggested that if an "open market" was desired, the only way action could legally be taken under the code would be to establish the New York market area as a trading region and then pass a resolution to the effect that prices for that particular region were not to be filed in accordance with Article XIII. But the minutes record that every member present pledged support to the provisions of the code as they applied to the New York market and offered assistance to correct the sub-standard practices. The later success of these measures is not indicated.

The Middlewestern Regional committee of the Vitrified Clay Sewer Industry evidently faced something of the same problem and voted as late as May 15, 1935, to make jobbers and independent sales agents subject to the code. This was forbidden by the Administration.(*)

The problem of control over distributors' prices also arose in connection with the price filing requirements in several divisions of the Rubber Manufacturing Code. The Code Authority for the Automobile Fabrics, Proofing and Backing Division requested on August 29, 1934, that jobbers be forced to adhere to fair trade practices, viz., open price filing. The Division of Research and Planning objected and the request was held in abeyance of the Administration. (**)

The Code Authority of the Rubber Sundries Division asked at one time that the Administration explain Article III, A, Section 1 of their code to include so-called "distributing manufacturers" in the price filing requirement.(***)

(*) Resolution 86 of the middle western regional committee minutes, May 15, 1935, and Letter from Deputy W. A. Janssen to G. B. de Lenth, May 24, 1935. NRA files.

(** Code Authority Minutes, 7-10-34, NRA files.

(***) See Memorandum to Deputy in charge of rubber codes for Research & Planning Division in NRA files

A letter of protest against filing prices in the heel and sole division, came from one member who stated that 75 per cent of the volume of product sold to repair shops went through jobbers, who were not required to file prices. He stated that it was well known that such prices fluctuated continually throughout the country and are different in different parts of the country at the same time, and that in order to stay in business he must reasonably be in position to meet such competition.

Members of the rubber hose division of this industry were accused in complaint letters to the Administration of extra-code efforts to control distributors in accord with a price fising agreement of manufacturers. The Federal Trade Commission investigation of these activities disclosed at least one attempt at a secondary boycott of a distributor who submitted a bid on rubber hose to the city of Milwaukee at less than the filed price of the concern which was to supply him.

4. - Summary

One may conclude from the preceding accounts that the existence of independent distributors competing with manufacturers leads almost inevitably to the necessity, or at least the desire, to extend price filing controls, usually through a policy of resale price maintenance. The methods for carrying through such a policy, if not explicit in code powers, are diverse and tend to conceal the frequency of the difficulty and the efforts to meet it. They include: (1) the preparation of approved jobbers' or distributors' lists and the forbidding or voluntary withholding of jobbers' discounts to those whose behavior is not pleasing to the supplier; (2) voluntary cooperation from distributors to file and/or to maintain manufacturers' prices, and assistance from them in boycotting noncooperative manufacturers and/or distributors: (The price filing may, as in the case of paper distributing, and the builders' supply trade, take place in a separate code); (3) permissive or mandatory resale price contracts obligating distributors to file prices or to abide by prices filed by their suppliers.

The success of these attempts to extend controls to distributors is affected by several factors. While the willingness of distributors to be controlled, in return for protection of their margins, is of great practical assistance to the success of such a policy, (*) even more importance may be attached to unanimity of interest in the manufacturing group and the absence of any major differences in reliance upon particular distribution channels or in consumer acceptance of the products. Such

(*) E.G.,,paper distributing trade, supporting paper and pulp, envelope manufacturing, etc.;commercial stationers and office outfitting code supporting business furniture; the Builders' supply trade supporting vitrified clay sewer pipe and others; the copper, brass, bronze and related alloys supporting copper and brass mill products. Such support was less effective in the case of the wholesale plumbing and plumbing industry codes.

Such differences may arise in size, completion of product-line, differences in sales methods, in degree of intergration, etc.

The large, full-line manufacturers, whose products have wide consumer acceptance, usually have a competitive advantage when prices are uniform. If, as is frequently the case, such manufacturers use their own outlets or branch houses, they are bound to observe their own prices under the ordinary price filing plan and hence are anxious that independent distributors be likewise bound to observe resale prices of manufacturers, thereby making it possible to perpetuate uniformity in the secondary markets. Small or short-line manufacturers, utilizing independent distributors, are prone to find such an arrangement onerous. (*)

The arrangement may tend to eliminate an alleged customary price differential or "spot" for such manufacturers - as was complained in the cases of plumbing fixtures, valve and fittings, rubber heel and business furniture, or the resale price maintenance provision may make it more difficult to attract distributors for less well-known products, as alleged in the mayonnaise industry.

In industries such as fertilizer and iron and steel, in which products are standardized, with no major divergencies in distribution channels effective control over distributors was possible, either by the code or by cooperative action. In other industries with a simple distributive system no problem of distributor control arose. Thus in the machine tool and forging industry products were differentiated, but sales were handled largely through exclusive salesmen or agents. The steel castings industry distributed largely to industrial users without the use of middlemen.

(*) E.G. mayonnaise, business furniture valve and fittings industry, cork mfg., funeral supply industry, wood cased lead pencil, asbestos.

E. Control Over Division of Business Through Statistical Reporting and Share-the-Business Plans.

1. Introduction

Perhaps the most significant attempts to extend price filing control were those in which price reporting was used as part of a general statistical plan, in furtherance of some formal or informal plan for sharing the business. The use of quotas in connection with price-fixing agreements is well known. Apparently, the maintenance of uniform and stable prices under an open price plan leads to a similar necessity to establish some acceptable means for distributing the available business, so that members will be content to know they are receiving a share of the total volume and will not attempt to increase that share by price cutting and other merchandising tactics disturbing to the group program. (*)

In many respects these statistical reporting plans are identical with the market reporting type of open price association described by the Federal Trade Commission in its 1929 report. They resemble, far more than most open price plans in NRA codes, the open-competition plans that were used by the American Hardwood Manufacturers' Association, the linseed oil industry and the maple flooring manufacturers, in that they require the exchange of full market information, including stocks, shipments, capacity, and production data as well as prices.

The only new feature of the plan, if any, is the announced philosophy of sharing-the-business, and the systematic carrying out of that philosphy through the medium of the open price provisions approved in the codes.

The filing of prices is not an essential part of the share-the-business plan , since quotas are ordinarily expressed in volume and might be adhered to or enforced without reference to the exact prices received by individual sellers. But since the basic purpose of such plans is to encourage the maintenance of a price level that will return a profit to industry members, the filing of prices offers a useful check against the tendency of any member of the industry to drop the price through concealed or special concessions and perhaps destroy the level for all. A tacit agreement to follow-the-leader or to observe a suggested price floor might accomplish the same end but would be less easy to discipline and of dubious legality. In this respect price filing may offer a convenient support to the share-the-business program. Conversely, the establishment of quotas on a percentage basis has frequently been found a useful support for a price filing program intended to result in uniform or stabilized prices. It is the latter development that appears more common in NRA experience.

Mr. W. J. Donald, Managing Director of the National Electrical Manufacturers Association, suggested something of this function of trade

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(*) In this connection see Chapter II, above, pp. 59-60.

statistics in a report on planning in the Electrical Manufacturing Industry, issued on February 4, 1935, as follows:

> Essentially, trade statistics have the same bearing as uniform costing activities on pricing policy, namely, that they provide additional data on the basis of which members of the industry may do business more intelligently, especially in regard to pricing policies.
>
> Knowledge that a company is or is not securing its accustomed percentage of the unit and dollar volume of sales of the industry, in contrast with gossip and 'weather reports' brought in by salesmen regarding prices and terms of competitors removes many of the charges and counter charges that would otherwise exist. Data regarding inventory conditions also provide important guidance to individual pricing policies.
>
> (Underlining supplied)
>
> So important is a sound statistical reporting system that some leaders of the industry have expressed the opinion that open price filing without corallary trade statistics sometimes results in more chaotic conditions in the field of pricing than would exist if no accurate knowledge regarding prices were available.

Mr. Donald does not refer to a formal quota plan of sharing the business but his remarks indicate clearly the function of such a plan.

2. Share the Business Plan In Corrugated Solid Fibre Shipping Container Industry.

Mr. W. W. Pickard, former Deputy Administrator in the NRA and later Coordinator of the various branches of the paper industry, set forth the philosophy of voluntary sharing of business and its relationship to open price filing in a speech before the National Container Association in Chicago, June 13, 1935. His remarks are especially significant because of his opportunity to observe at close range the functioning of price filing in the various paper industries and to appraise their results. These price filing provisions were complete in scope, with wide residual powers left to the code authority in each instance. In general, they functioned smoothly, with few complaints of non-compliance. With one or two exceptions they were conspicuously successful in maintaining prices at a uniform and profitable level. By the usual industry standards of performance they were "successful" open price plans. This should be kept in mind in reading Mr. Pickard's general opinion of the deficiencies of the open price mechanism as a measure for stabilization, and the values of a quota system.

Defining the purpose of any stabilization plan as being to "bring about an adjustment between productive capacity and demand, at a point that would yield the industry as a whole a fair profit, Mr. Pickard indicated that neither control of production or control of price could

accomplish the purpose, because both overlooked the fundamental fact that production was already controlled and limited by demand. (*)

> "The real problem was how to divide up such production as there was, among the individual units of the industry in such a way as to cure the existing conditions which had already eliminated profits, reduced wages to a minimum and made huge inroads on capital investment.
>
> "On the price approach to the problem the most commonly used mechanism was the open price plan.
>
> "It was soon found that the mechanics of price filing were not nearly so simple as they looked at first. In order to make filed prices intelligible and comparable, one with another, elaborate regulations relating to grade, quality, quantity, freight allowances, discounts, agents' commissions, jobbers, chain stores and a hundred other things were added to the plan. Further regulations were necessary to put cost determination on a uniform basis. The whole thing became a labyrinth. This tended to produce violations and in fact it became difficult to tell in many cases whether a transaction did or did not violate the rules.
>
> "That the open price plan would produce uniformity in price was recognized but the theory was that, at a uniform price, each member of the industry would get his fair share of the total business. This theory failed to take into account the fact that at all times price variations are the rule and strict uniformity is abnormal. It was soon found that, at a uniform price, some individuals were falling below their usual volume position in the industry. Before the code the usual remedy would have been a shading of price until the normal volume adjustment was restored, but under the code this remedy was no longer available. A price could not be shaded without filing and publication, and this resulted merely in reducing the whole price level and left the sufferer for volume worse off than before.. No matter how law abiding an individual may be, when he reaches a point where it is a case of violating the law or perishing, he will choose violation. He begins to cut prices secretly and by subterfuge and as soon as such practices assume any considerable proportions the open price plan is

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(*) This attitude, it may be noted, does not recognize that there might be a greater demand at a lower price, if there is marked elasticity of demand.

doomed. In one industry after another which came under my observation, the open price plan gradually disintegrated and finally collapsed and was either officially abandoned or, what was worse, became a dead letter. Of course there were real chiselers and, of course, the NRA was weak and vacillating in its enforcement program, but these only hastened an inevitable result.

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".....what was needed was a plan which would apportion such business as there was on a fair basis, or, expressed in another way, as would apportion the burden of carrying equipment already made idle by lack of demand so that no one would be crushed. Only one plan which actually accomplished this and was proposed or put into effect. It was the plan which the container industry is using. Under this plan the normal position of each member of the industry, in terms of percentage of the total production, is determined and the members then voluntarily limit their individual production to that percentage of the total, whatever the total may be...

"At this point let me say that I believe now and believed then that as legislation the clause which was included in your code had no value. Its value lay in the fact that by the approval of the code the principle of voluntary sharing of business was recognized and given official expression. In my opinion the practice of sharing business is now and always has been legal.

"Please understand, however, that this perfectly innocent tool may be used in connection with some illegal act and might for that reason be condemned. Production control by agreement is illegal and always has been and the line between limiting production and dividing up such business as is available to the industry must be kept sharp and distinct.

****

"My conclusion is that voluntary sharing of business has worked. Furthermore, it is the only one of all the plans submitted to the NRA which has worked. Even in the few cases where the open price plan has been a success it has been so only because it had under it an unannounced and perhaps hardly recognized adherence to the principle of sharing business."

The suggestion is made here that the quota plan would allow some leeway from the rigid and artificial uniformity of prices under an open price plan, and would avoid the shifting of volume that such uniformity might be expected to produce, while still deterring the "cutting" of prices in an effort to attract non-existent volume.

This would assume a slight dispersion of prices around the prevailing price, but would still necessitate group cooperation to observe the profitable range of prices until it became generally advantageous to raise or lower the range-)because of increased or decreased demand, lower or higher costs, etc.). The theory is essentially that of a managed price.

The success of these plans depends largely on the acceptance by all industry members of the status quo, so far as their volume position in the industry is concerned. It involves confidence that the existing managed price is the best price possible and that there is nothing to be gained by lowering that price, either individually or for the industry as a whole. It involves also a general acceptance of the principle that excess capacity should or must be supported without liquidation, that the burden of supporting it must be shared by the industry as a whole (either through price cutting or through cooperation) and that the best way to share it and to survive is to refrain from lowering prices and thereby intensifying price competition.

The economic implications of these assumptions need to be examined from the point of view of the public welfare with far greater care than has been bestowed upon them in the past. To the extent that the existing proportionate distribution of volume among producers is not in accord with the relative efficiency of those producers, it cannot be deemed entirely in the public interest to freeze that proportionate distribution by schemes either voluntary or backed by mandatory sanctions. And to the extent that price is managed so as to protect excess capacity and capital charges, it is not performing the function ordinarily ascribed to it. Finally, the demonstrated ability of a group to manage prices to such an end suggests immediately the need of some degree of public observation to see that the ability is not misused-- as Mr. Pickard indicates that it could be used-- to control production and to maintain prices at an unnecessarily high level.

The corrugated and solid fibre shipping container industry had introduced into its code price filing provisions similar to those appearing in other paper codes, but apparently made no attempt to put them into effect. The provision was optional and might be put into effect "from time to time" on specified products as determined by the Code Authority, with due notice to members 30 days prior to the date fixed. Members might file or abide by the lowest price and most favorable terms filed by another.

Evidently the provision was intended to be used only if needed. Article VI, Section 12 gave to the code authority, for the purpose of checking compliance with the cost provisions, the power to require members to submit to a designated agency, with respect to closed transactions only, complete information in regard to any quotation, order,

contract, or sale of any product of the industry, including information as to specifications, quantities, price, conditions of storage, transportation or delivery, terms of billing, cash or trade discounts allowed, and other pertinent facts relating to such quotation, contract or sale. These reports, plus the statistics submitted and compiled for the industry in connection with the voluntary share the business plan provided for in Article VII of the code, and approved by the NRA in 1934, were apparently all that was necessary to establish the desired stabilization in this industry.

3. The Envelope Price Filing and Quota Plan

The use of the statistical reporting and "quota" system in connection with a going open price plan is best illustrated by the envelope manufacturing industry, whose code was administered by the same industrial management group that acted for the corrugated and solid fibre shipping container industry. (*) Inasmuch as this group served as agent for a score or more of codes, many of which contained open price plans, it is possible that an examination of the records of these industries would show similar applications of the "budget" reporting plan.

a. Organization of the Envelope Industry.

Some few facts about the organization of the envelope manufacturing industry and the provisions of the open price plan are necessary for an understanding of the budget plan of operation.

The envelope manufacturing industry is made up of two groups of manufacturers, one selling direct to industrial consumers and another selling chiefly through distributors. The Industry as a whole comprises approximately 175 members. The United States Envelope Company, the dominant company and acknowledged price leader in the industry, distributes through branch companies and jobbers. The Western Envelope Company of Kansas City, Missouri, is the largest manufacturer selling direct to consumers.

The efforts of the industry at price stabilization centered around the difference in the marketing methods of the two manufacturing groups, since any effective plan necessitated the cooperation of both. The past tendencies on the part of consumer manufacturers to reduce prices on direct sales had had a growing tendency to cut into the sales of jobbers and to lower prices at the consumer level. This circumstance, combined with great surplus capacity, suggested the need for compromise, which was attempted under the code by the establishment of standard trade differentials to the various classes of distributors and consumers.

(*) Stevenson, Jordan and Harrison

b. The Price Filing Provision.

The original open price proposal in the Envelope Code provided for the filing of prices to "each class of trade", with mandatory price differentials to be fixed, based on differences in cost of distribution to various customer classes. These differences were to be ascertained by means of an approved cost accounting system. This provision was objected to by certain advisers, and was deleted from the price filing plan before approval, as was the proposal for a mandatory zoning system. Both the requirements for customer classification and the zoning were restored through the rulings set up by the code authority for the operation of the price filing plan.

Members of the industry were not required to file individual price lists, but could accept the schedule of another company as a minimum price list to be observed. This plan resulted in price filing being limited almost entirely to the United States Envelope Company, representing the jobber mills, and the Western Envelope Company, the direct consumer mills. The price lists of these two companies became the practical price lists for the entire industry. When the open price plan was made effective under the code, The United States Envelope Company filed very exhaustive price lists, covering practically all of the products of the industry, for each of the various classes of trade.

These price lists were filed by designated zone areas extending from one to seven from the Eastern to the Western part of the United States. Price lists for Zone 7, the Pacific Coast region, were characteristically higher than those for other zones.

NRA files contain records of only about twenty-five (25) price filings from the entire industry. Roughly half of these are by the United States Envelope Company, four or five are by the Western Envelope Company, with one or two scattering lists from other companies. (*)

A more detailed study of the set-up outlined above shows three possible groupings of industry interests under the open price plan -- the consumer vs. jobber type of manufacturer; the large vs. the small members of the industry, and the regional interest.

c. The Budget Plan.

The budget plan of operation was meant to preserve a balance for all of these conflicting interests and to prevent any shifting of volume which might be caused by price stabilization, and would in turn destroy that stabilization if not recognized and adjusted. The basis of this plan was a series of volume or production reports to be furnished by members of the industry for three years -- 1931, 1932 and 1933. These reports were compiled and used to establish "normal" distribution of industry volume, from which later variations could be measured.

(*) Memorandum to W. J. Brown, Deputy Administrator from G. K. Hamill, Assistant Deputy Administrator, on April 15, 1935, re Code Administration, Envelope Industry Code, Open Price Plan, NRA files.

Bulletin No. 28 of the Envelope Industry Code Authority, issued July 19, 1934, transmitted the forms to be used in compiling and submitting these volume reports which were to include (1) the volume of envelopes shipped, (2) the volume produced, and (3) the dollar value, of sales. The three annual reports were to be supplemented by separate monthly reports beginning with January 1934. The purpose of these volume statistics was set forth in this same bulletin as follows:

> "Members will receive real benefit from these statistics. The figures submitted by individual members will be compiled into opposite totals for the whole industry. Reports showing these totals for the whole industry will be furnished to every member of the industry. Each member will then have before him a clear picture of the state of the industry, the general level of volume prevailing, for the month just ended and as compared with previous months and previous years.
>
> "The composite reports which will be prepared for the information of members will provide figures never before available from either Government or private sources.
>
> "Each member of the Envelope Industry quite rightly feels that he has a definite place in the Industry. From these statistics, as they will be transmitted to all members, each individual manufacturer may determine what share of the total industry volume of business he has had in the past, and what share he is currently getting.
>
> "No figures for any individual company will ever be disclosed in any form or in any manner to any other member of the Industry. As in the handling of all other confidential data, extraordinary precaution will be taken to assure that the reports rendered by individual companies the records kept thereof and any outgoing reports to members showing individual figures, are held strictly secret and confidential."

Up to this point the explanation of purpose has not differed from the general trade association plan of industry statistics. It is only by establishing the special relationship of such percentage figures to the open price plan, that there is revealed the further purpose that these volume statistics are meant to serve as a check against the possible economic effects of price filing in bringing about shifts of volume from one manufacturer to another. Bulletin #28 continues as follows:

> "Your Code Authority has repeatedly endorsed the principle that the administration of the Code and of the Open Price Plan of selling shall not be allowed to result in any major shift of volume from one section of the Industry to another, from one class of plants to another, or from one channel of trade to another. The statistics called for on Form E-11 and Form E-12 are quite necessary to enable the Secretary to report to the Code Authority whether at any time such a shift of volume of business is occurring. The Secretary will also

be enabled to consult in confidence with individual members with respect to any apparent shift of the volume from which they may be suffering.

"Without such statistics as these volume reports will provide, an individual manufacturer can never be sure whether a falling off in volume in his own business is merely due to a general falling off of envelope business at large or whether it represents an actual slump in the relative volume of business enjoyed by his own company.

"These volume statistics will contribute materially to the success of our Open Price Plan and to the general stability of the Industry. They are likely to become the most valuable mechanism which we will have for intelligent planning and intelligent management of the Industry along profitable lines."

An announcement concerning the general composite reports was made at the September 24, 1934, meeting of the Envelope Code Authority. This first composite report was based on the volume reports received from 93 members of the industry, estimated to represent 85% to 90% of the total volume of production. Members present were furnished with individual copies of these composite reports which carried, for comparison, percentage figures for their individual companies. It was explained by the chairman that the average monthly total of production for the three year period, 1931, 1932 and 1933, had been tentatively taken as normal and expressed as 100%. The volume for each of the first eight months of 1934 was expressed as a percentage of normal.

"In the figures for the individual company, the monthly percentages show the company's current volume in percentage to the individual companies own normal or past average. Comparison then of the individual company's percentages with the group or industry percentages shows whether the trend of the individual company's business has run parallel with the industry or whether it has run behind or ahead of the industry."

Members of the code authority present at this meeting agreed mutually to disclose and compare the percentage to normal for their individual companies for comparison with the industry total percentages. Additional composites were made available covering groups of members in various territories and groups representing various types of business classified according to methods of marketing.

It was found from these volume reports that composite figures for a group of jobber plants showed a volume for the first 8 months of 1934 lower in relation to normal than the volume for the industry at large, whereas various composites for consumer plants and local trade plants showed 1934 volume to date higher in relation to normal than the average for the industry. (*)

(*) No data are available to indicate the extent of this change.

Evidently some disturbance in the market in the Southeastern territory of the United States was disclosed by the reports. One member of the code authority explained that the instability of prices had been caused by the action of a paper merchant in filing lower prices on envelopes, under the price reporting plan of the Paper Distributing Trade.

The minutes reported that "after extended discussion of all the facts available in regard to the Southeastern market, and after review of special composite volume reports covering groups of members in that territory, it was the consensus of opinion that no change in the "Open Price Plan" would be warranted at this time. (*)

At this same meeting of the code authority it was voted to prepare composite volume reports along several new groupings. Composites by classification were to include five groups, defined as follows:

1. Jobber plants -- firms which sell chiefly to wholesale merchants or wholesale envelope merchants;

2. Paper merchants plants -- paper merchants who own and operate envelope plants;

3. Stationery and tablet plants -- firms which are members of the Paper Stationery and Tablet Manufacturing Industry;

4. Trade plants -- firms which sell principally to distributors other than wholesale distributors and not extensively to consumers; and

5. Consumer plants -- firms which sell principally direct to consumers.

Each member of the industry was definitely classified in one or another of these groupings in preparing composite volume reports for distribution to members. Similarly, eight geographical reporting areas were established for volume reports, with their boundaries set forth.

The available records are too fragmentary to trade the effects of the quota principle of maintaining the normal volume position of individual industry members under the operation of the price filing plan, although references are frequent in the minutes to these percentage reports and to revisions of the classes of trade and schedules which may have been necessitated by the results disclosed. Thus at the meeting of November 9th and 10th, 1934, a new composite volume report was considered, in which members of the industry were divided into groups according to size; namely, large plants,

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(*) It should be pointed out in this connection that the Open Price Plan of selling as referred to here was not the open price provision itself but the elaborated plan set forth in Bulletin 14 of the Code Authority, which was made up of a complete set of specifications, standards, indexes of price schedules and differentials for the established classes of trade defined therein.

medium sized plants and small plants. According to the report, the figures indicated that since the effective date of the code, the small and medium sized plants had secured a larger proportion of the business available than they had enjoyed during the past three years, while the large plants had suffered a corresponding decline in their share of the total business.

d. Breakdown of the Price Filing Plan.

Even at this early date it was becoming apparent that rigid enforcement of the code along the lines prescribed in the "Open Price Plan" was not possible, and that violations were in many cases resulting in a loss of established business by those members who complied with the plan. Steps were taken at the November, 1934, session to relieve such members from the effects of these violations, by means of the following resolution: (*)

> "WHEREAS it has not yet proved practical to prevent certain manufacturers and distributors from selling below the filed prices provided for by the Open Price provisions of the Envelope Code, and, WHEREAS this practice works great injury to those manufacturers and distributors who adhere to such filed prices, the Code Authority, subject to approval by a meeting of the Industry, hereby rules that members of the Industry, in defense of business from their established customers or from established customers of their distributors, may meet bona fide known competitive prices, provided that a complete record of every such transaction shall be filed with the Administrative Agency immediately, and further rules that it will accept for filing, schedules of prices and terms of sale containing the following reservations:
>
> > "The right is hereby reserved, in defense of business from our established customers or from established customers of our distributors, to meet bona fide known competitive prices.
> >
> > "For the purpose of this ruling an established customer shall be defined as one, a substantial portion of whose business has been enjoyed by such member directly or through a distributor."

The difficulties that appeared in the operation of the Open Price Plan followed in large part the issuance of Office Memorandum 267, dated July 30, 1934, forbidding the use of mandatory customer classification under open price plans. The code authority classifications had been in effect without NRA sanction until April 1935, when Mr. G. K. Hamill, Assistant Deputy of the Paper Division, submitted them for advisory opinion. Later he disapproved the Bulletin setting forth the defined classes of trade.

(*) Minutes of meeting, November 9, 1934, NRA files

Almost simultaneously with this action, the code authority voted to stay the Open Price Plan in the industry. This decision, coupled with the imminent termination of existing NRA legislation and the expected revision of codes, led the deputy to refrain from any official order of disapproval.

The relatively short period of operation covered by industry reports prevents any real analysis of the effects of the quota plan but they do suggest the possible uses to which such corollary statistics could be put. They raise the basic issue of the economic justification for efforts to stabilize production on the basis of past volume of sales and existing excess capacity, and the further question as to whether the attempt to prevent shifts of business that might occur under open price filing would not defeat one of the ostensible purposes of those plans in preventing any wholesome adjustments that might take place with open prices any improved competitive conditions that might arise through them.

4. The Commodity Group Plan for the Candy Manufacturing Industry.

One further experience with a budget plan in connection with price filing is afforded by the candy manufacturing industry. The history of this plan, and the course of its operation, would indicate that it was first sponsored by Dun & Bradstreet, Inc., who had been appointed by the code authority at its first meeting as the agency to handle price filing. The minutes of the code authority meeting on July 15, 1934, report that Mr. H. B. Ludlum, representative of Dun & Bradstreet, Inc., (a former official in the NRA who participated in the first Price Hearings, in January, 1934), reported at length on the experience of Dun & Bradstreet, Inc., in receiving and filing price lists, and made a number of suggestions and recommendations for the organization of the plan. Mr. Shannon, NRA legal counsel, suggested that Dun & Bradstreet, Inc., be allowed to draw up the rules for the price filing plan. A committee to draw up classifications and products of the industry and to determine the separate classes of buyers to be recognized in the filing of prices was appointed to assist. These classifications included definitions of buyers meant to conform closely with those in the Wholesale Confectioners' Code. (*)

The price filing plan as finally developed was called the Commodity Group Plan. The code authority at various times utilized the services of Ernst and Ernst, cost accountants, Dun & Bradstreet, Inc., as confidential agents of the code authority and later, Stevenson, Jordan and Harrison to operate the Commodity Group Plan, so that nothing short of an elaborate case history would give a complete story of its development. The Commodity Plan was operated in conjunction with the detailed customer classification plan mentioned above, which was not sanctioned by the NRA. It was apparently developed in its final form after informal attempts at price fixing in the industry. (**)

(*) The definitions were revised frequently in later meetings of the code authority and were used during most of the period of code operation, although members were informed by the deputy administrator in September, 1934, that such classification was not permitted under existing N.R.A. policy.

(**) See p. 424 below.

At a hearing held by the NRA on January 19, 1935, to investigate charges of price fixing, the Chairman of the Code Authority, Mr. Williamson, related the numerous efforts of the code authority to operate the price filing provisions of their code in such a way as to bring about a profitable and stable price level, and the final adoption of the Commodity Plan. The industry made an early attempt to secure approval of a mandatory cost manual based upon a survey conducted by Ernst and Ernst. It was hoped to use this manual as a basis of protection against sales below cost. The cost manual was never approved, although it was considered by Mr. Williamson and others to be a necessary accompaniment to the price filing provision. The stay of the waiting period by the general Administrative Order of January 27, 1934, had brought further disorganization to the price filing discipline.

Refusals of the NRA to grant requests for emergency declarations in the industry further discouraged the industry and suggested the need for independent action to stop price cutting. The first request for an emergency declaration was made early in September, 1934; a second request was made in January 1935. The attempt at price fixing evidently began during the period between these two dates, if we can accept the testimony of Mr. Williamson and others.

Stevenson, Jordan and Harrison were retained, after the investigation of the alleged price-fixing and the change of Mr. Williamson from his position as chairman of the code authority, to operate the so-called Commodity Group Plan.

The plan itself is described by a former part-time administration Member, George A. Chapman, in a memorandum transmitted to the NRA in July, 1935, with the recommendation that it should be proposed as a voluntary agreement in the event of any extension of NRA codes by new legislation. His report advances the same need for the voluntary acceptance of normal percentage volumes that have been already noted.

Briefly, the plan involved dividing the industry into eight or more groups composed of members manufacturing identical or similar items:

> "These groups to hold frequent meetings in order that the personal elements and confidence in one another might be established, the group members to furnish statistical information to a confidential agency, such information to be tabulated into some total and the manufacturers' percentage of the total transmitted to the individual member. The Candy Industry more than anything also needs to know more about its industry through the volume of the various kinds of candy marketed in the different areas and to note their own percentages of the total business. If a manufacturer is receiving a normal percentage of business he is not apt to sell below cost. In general, this industry has been operating as though there was an unlimited amount of business and that they could eventually bring their volume up to a profitable basis by selling below cost until that profitable volume is reached.

"The confidential agency able to distribute statistical information of this nature as well as cost information could undoubtedly have great influence in stopping sales below cost."

The Code History for the Candy Manufacturing Industry gives some further description of the plan, which provided for the reporting by members, of statistics pertaining to (1) poundage of shipments; (2) value of shipments; (3) price per pound; and (4) the trade channels in which the merchandise moved.

"These figures were to be compiled, tabulated and partially analyzed in order that each member reporting those statistics might calculate the relation of his business in any group to the total business reported in that group and thus ascertain whether he was holding his position or gaining or losing with reference to the group as a whole. It should be observed that these statistics were to be on past and closed transactions and that all data submitted were to be without the identity of the individual manufacturer in order that individual reports might not be disclosed in an identifiable form to any other member of the industry.

"Through these devices the Code Authority, acting on behalf of the industry, felt that many desirable data heretofore undisclosed might be assembled and through their intelligent interpretation by the recipients of such data the price structure might be stabilized without being increased unduly. The plan was in effect for so short a time as not to warrant the drawing of conclusions as to its efficiency." (*)

Excerpts from the minutes of the code authority meeting of May 10 and 11, 1935, would indicate that this Commodity Group Plan met with some considerable opposition from members of the industry and from at least one member of the code authority. A progress report was read at that meeting on the work of Stevenson, Jordan and Harrison, which showed "encouraging results except in Zone 7." The failure of the plan in this zone was suggested as being due to the opposition of Mr. Berger, Assistant Secretary of the National Confectioners' Association. Mr. Berger was reported as stating that "he was most antagonistic to the plan and that he was making his objections known to the industry in that area, and further, that he expected ultimately to see the whole set-up of this Commodity Group Plan declared illegal." Further evidence was presented that Mr. Berger had refused to furnish certain information requested by Stevenson, Jordan and Harrison and had practically ordered a representative to get out of his office and not to bother him, but to let Stevenson, Jordan and Harrison figure it out for themselves.

(*) Code History, pages 46-47.

5. Prevalence of Budget Plans

It is not possible to determine to what extent the budget or quota plans actually resulted in the freezing of existing volume distribution in those codes in which they operated, nor to estimate the prevalence of such plans in connection with the N.R.A. price filing plans, (*) The proponents of this principle of sharing-the-business appear chiefly among the older established trade associations and include representatives of at least one of the leading organizations engaged in industrial management. Such groups are traditionally less inclined to resort to secret agreements or overt price fixing efforts that might subject them to action under the anti-trust laws, and have used alternative procedures for accomplishing the desired stabilization of the industries they serve. A later study of open price plans should explore these methods in an attempt to appraise the economic or administrative merits and demerits in more adequate fashion than has been possible in this study.

6. The Eddy Plans and the Budget System.

Evidence of the relationship of the early Eddy open price associations to the budget plans described in this section is furnished by a letter from a former associate of Mr. Eddy, who had served as attorney for numerous open price associations William J. Matthews of the Window Shade Institute, New York City, was invited, in connection with the present study, to comment upon the theory of open prices set forth by Professor J. M. Clark in the statement entitled "An Interesting Issue". (**)

Mr. Matthews' letter in answer to this invitation refers at one point to Prof. Clark's statement that under an open price plan members will be deterred from lowering the price since they will be unable to increase their total share of the business because of the rapidity with which the price cut will be met. Although in general disagreement with Professor Clark's views, Mr. Matthews, agreed that price cutting would be minimized by the workings of an open price plan because it discloses the fallacy of such tactics as a means to greater volume. He comments in part as follows:

> "Prices are set to get an individual order, acquire a particular customer, to maintain a certain volume so as to economically operate the plant, and frequently to increase the volume and lower the unit production cost. This last reason is thoroughly unsound from the standpoint of the individual, especially in a subnormal market when there is not enough business for all. In order to arrive at the same net, if one should cut the price 10% he would have to increase his volume 30%. In the absence of an expanding demand, that excess percentage of the industry business must necessarily come from other competitors who have the choice of staying out of the market or meeting the lowered price. The latter will ultimately happen, with the result, as production

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(*) The Paper and Pulp Industry proposed to incorporate a provision for a share-the-business plan in its revised code, submitted in Public hearing, June 29, 1934, but there was no indication of any intended connection with the price filing plan.

(**) See Chapter II, p. 62 above.

figures invariably show, over a period competing sellers will acquire approximately the same percentage respectively of the industry's total business. The open price plan needs to be supplemented with production figures so that each will know from month to month his percentage of the industry total. If one's percentage slips substantially and he finds from the price reports that special concessions have been made, he can conclude that the reduction in his share of the industry business is offset by the increase of those who have been making the special prices. When those facts are brought out, competition on price, as evidence through the reports, will automatically tend toward more stable prices and greater consistency in the respective, individual percentages of the total industry volume. Such is all educational and market facts are the prerequisite. In operation the reporting of prices does not result in arbitrarily high or fixed prices at all, as many seem to think. The minute prices become arbitrarily high, someone will instantly see that he can operate at a profit on a lower level and will immediately do so. The operation of the open price plan proves exactly that and yet there is no agreement to name any fixed price, which should never be dictated by the government or industry.

"Contrary to one statement made in this document (Prof. Clark's statement) the open price filing system does not tend at all in the direction of a monopolistic price, if it is meant by that, an arbitrarily high price. And, furthermore, as already stated, the mere publication of the price operates as a deterrent factor in preventing one from making prices which are too low. Much is said in this document about a price cutter increasing his volume and, as I read it, it is either assumed, or conditionally assumed, that one, through the cut-price route, might consistently increase his relative share of the business. I believe I have sufficiently explained that phase and it can be stated positively that except in rare and peculiar instances, such does not happen."

One point in the above calls for further comment. Mr. Matthews fails to indicate just why a member will lower his price the instant he sees that "he can operate at a profit on a lower level." If he can not, by that means, obtain a larger proportion of the total business, there is no obvious reason why he should choose to decrease his margin of profit on the existing volume. Mr. Matthews' earlier argument would appear to invalidate his conclusion, unless the demand for the product is elastic enough to increase total volume considerably with a cut in price.

His general conclusion about open price plans bears a striking resemblance to the conclusions voiced by Mr. Pickard, and to the warnings of Mr. Eddy that price filing is a long time cooperative means of stabilization, not a substitute for price fixing by government or private interests:

...in my judgment, the open price system is the answer to all questions which have been raised by the NIRA. It does not serve the purpose, if such purpose be in contemplation, of setting up any elaborate control in Washington. On the contrary, even that system should be put squarely up to industry to adopt it or not, as they see fit and the more they try to get control, either on the part of industry or by the government, the greater will be the fiasco. These things cannot be done by law, and even as applied to the open price system there will never be a law, in my judgment, compeling all those participating in a particular market to file and publish their prices, or to adhere to them when filed. Already the open price system is legalized and if Industry were told that it is in the interest of industry and the public to use the open price system -- and that industry could not and should not look to the government for any other method, legal or otherwise, to enforce control over production or prices, because that cannot be done without the running of industry by a centralized government -- that would be the sound method of approach."

CHAPTER V

PRICE STRUCTURES UNDER PRICE FILING

In Chapter II, it was pointed out that a full account of developments under price filing would include evidence of the direction and extent of price movements, the frequency and range of price fluctuation, the relative treatment of different customer classes, changes in the degree of complexity of the price structure, and changes in the uniformity of customer classifications, list prices, terms of sale, and net prices. As is indicated in that statement, it is not possible to do more in this chapter than to set forth certain case studies bearing upon some of the points named. From these case studies it becomes clear that price filing as such was not accompanied by any one kind of variation in prices, but there was great diversity in price movements from one industry to another.

The cases presented below were selected as those in which the character of price change during the price filing period is most clearly indicated by the available evidence.

A. The Level And General Direction Of Prices Under Price Filing

1. The Concept and Problem of Price Levels

It has generally been assumed that "open" prices tend to be higher than "secret" prices for a number of reasons, of which the following are most commonly cited:

(a) Some of the price reductions which would have been made because of ignorance of market conditions will not be made under an open price system.

(b) Secret rebating will be made more difficult and the price wars which they sometimes precipitate will occur less frequently.

(c) Price cuts which the seller otherwise would feel he should make may not take place because of his fear of engendering the ill-will and possible retaliation of powerful competitors or the trade association.

(d) Secret price agreements which might break down by reason of secret concessions made by certain competitors can be better maintained since the necessity of filing prices will either deter the price cutters from making concessions or it will better enable the trade association or dominant competitors to identify and police infractions of the agreement.

(e) Laggards in following the movements of price leaders may also be more easily identified and brought into line.

Previous statistical studies of the movement of price levels under have been rather inconclusive in their findings. (*) The lack of significant and amenable price data and the complication of the problem by many influences other than price filing have been the principal limiting factors. (**)

The same lack of a complete history of the changes in price structures is also a limiting factor in this study, especially insofar as comparisons of pre-code and post-code price levels or trends with those of the code period are desirable. Many of the industries with open-price provisions in their NRA codes did not have price filing either before or after the period of NRA operation; in those cases where price-reporting plans were in effect, the pre-code and post-code filings and merchandising plans have not been made available to the Price Filing Unit except in one or two instances. In some cases it has been proved impracticable to calculate the prevailing price levels for certain industries during the code period even with a complete collection of price filings and merchandising plans at hand due to the lack of suitable data showing the volume of sales which passed through the respective channels of trade.

The most profitable method would appear to be a series of intensive case studies utilizing a sample of carefully selected industries. The present study suggests such an approach; however, the limitations on the selection of the sample and the pursuit of certain aspects of the intensive analysis make it a very imperfect example of what might be done.

In order to simplify and facilitate the analysis, the industries used as illustrations of changes in price levels under open-price codes have been divided into three groups--those showing (a)higher, (b) comparatively stable, and (c) lower price levels.

2. Examples of Higher Price Levels

a. Steel Castings

In the steel castings industry, the code authority suggested price levels equal to 87 per cent of the levels prevailing for the same products in 1926 in its report to members on December 5, 1933. These levels, as a general rule, were fairly well maintained much as originally suggested, throughout the code period. Furthermore, the evidence

(*) Federal Trade Commission, Open Price Trade Associations, 1929, p. 102; Simon Whitney, Open Prices. Report, Division of Research and Planning NRA April 3, 1934, pp. 21-33; Nelson, Milton H., Open Price Associations, pp. 177-180 Supra

(**) Those studying the problem have usually had to rely upon the price data compiled by the Bureau of Labor Statistics. Since some of these series represent list price quotations rather than actual transactions, the price movements taking place through the addition or elimination of discounts and other changes in the price structure are not fully taken into account.

available seems to indicate that these price levels were higher, especially on the small castings, than those existing immediately prior to NRA and that the trend of prices turned downward following its termination. (*)

It is also interesting to note that this experience under the NRA seems to have paralleled, in many respects, the same industry's experience with price reporting during the period 1923 to 1926. The industrial engineers who examined and checked the pre-NRA price research sponsored by the industry made the following statement:

> "During the examination of 1926 selling prices, the Engineers found that in many cases the schedules used in 1926 were the same as those in effect in 1925, 1924 and in some instances even in 1923. Beginning in the latter part of 1926..... "(price reporting was discontinued in December 1926)".....the selling prices generally scaled downward and in most cases 1927 and subsequent schedules were at lower selling prices than those of 1926." (**)

In general, the prices of Steel Castings apparently increased almost twice as fast as costs under NRA. (See Tables II and III, Appendix B, this study), increases being 18 per cent and about 9½ per cent, respectively. During the same period prices of "producers goods for capital equipment" advanced less than 4 per cent. (***)

While these price and cost comparisons are subject to the limitations usually imposed by such general price terms, they give the impression that Steel Casting prices increased more than the average for the same broad class of products.

(*) See Price Filing in the Steel Castings Industry, (NRA Price Filing Studies, 1936, included in this report as Appendix B.

(**) Ford, Bacon & Davis, Industrial Engineers, New York, Report, Selling Price Schedules for Miscellaneous Steel Castings, December 29, 1933, p. 14, NRA files.

(***) National Bureau of Economic Research, Monthly Letters.

When the original and final schedules filed for 18 representative steel castings are compared, it appears that the trend was downward in about 22 per cent of the cases, upward in approximately 22 per cent, and showed no change for the remaining 56 per cent (see Table I). It must be remembered, however, that in most instances the original filings represented substantial increases over pre-NRA price levels and that generally the final schedule filed, even where it was slightly below the original under NRA, constituted an appreciable net gain over pre-NRA levels.

TABLE I

Original and Final Price Schedules Prevailing for Eighteeen Representative Steel Castings Under the N.R.A. Codes.

CASTING	Original Letter Schedule 3/	Final Letter Schedule	TREND Up	Down	No Change
1. Aeronautical-N.O.C.B.N.	C	C			x
2. Agricultural machinery combine-harvester	F	N-O-P Q-R-A 1/		x	
3. Automobile axle housings (banjo type)	C	K-P	x		
4. Automotive brake clutch pedal & similar levers	B	B			x
5. Automobile brake drums	I	I			x
6. Bread slicing machine	K	K			x
7. Hydraulic cylinders	G	G			x
8. Dredge ball & socket Joint	L	L			x
9. Motor frames (box type)	K-K	K-J	x		
10. Gears-cast tooth	O-N	O-M	x		
11. Heat treating furnace, etc.	K-M-N	K-M	x		
12. Locomotive driving boxes	P 2/	P 2/		x	
13. Sectional u-bends	L-M	L-M			x
14. Refractory & brickyards (roller tires)	M	M			x
15. Roll-housings caps	Q 2/	Q 2/		x	
16. Power shovel & dragline bases	M-L	M-L			x
17. Shoes & treads	O)-P	O)-P			x
18. Valve bodies	I	K		x	
Totals			4	4	10

Source: Compilation by Statistics Section, NRA from Daily Price Reports published by Steel Founders' Society of America.

1/ O.P.".R and S filed for various weight classifications, Division VI only

2/ These castings were affected by changes in the N.A.D. regulations thereby causing changes in the level of prices although the general letter shcedules remained the same.

3/ See Appendix B for explanation of the process of filing letters to represent price shcedules.

b. Fertilizer

Mixed fertilizers and superphosphate increased in price under NRA (1933-1935) while imported raw materials -- nitrate of soda and kainit -- declined. The net changes computed from both the price filings and the wholesale price series compiled by the Bureau of Labor Statistics are shown in Table II.

TABLE II

Percentage Changes in Fertilizer Prices
1933-1935

Grade of Fertilizer or Type of Raw Material	I N C R E A S E S		D E C R E A S E S	
	Price filings, Zone 5	Bureau of Labor Statistics	Price Filings, Zone 5	Bureau of Labor Statistics
8-3-3, list	8.1	19.0	-	-
8-3-3 net cash	10.7	not included	-	-
8-4-4 list	6.7	not included	-	-
8-3-3 tobacco grade list	10.0	not included	-	-
16 per cent superphosphate, list	13.8	18.5	-	-
Nitrate of soda, list	-	.4	8.5	-
20 per cent kainit, list	-	12.3	.5	-

SOURCE: Adapted from Whitney, Simon; Fertilizer Industry Price Study, Division of Review, NRA, Preliminary Report, December 15, 1935, p. 24.

These changes in fertilizer prices may be compared with increases of 12.8 per cent and 9.6 per cent in the Bureau of Labor Statistics index of 784 wholesale prices and its index for finished products, respectively, from November, 1933, to May, 1935.

It appears that 8-3-3 is the most popular grade of fertilizer in Zone 5, that about 8 per cent of the 1934 sales of fertilizer were for cash, and that some 87 per cent of the farmers in that zone ordinarily

buy in quantities too small to command a quantity discount. (*) Table III Column two, shows this most typical price as well as the prices of two other mixed grades and for the three principal raw materials.

TABLE III
Fertilizer Prices to Consumers
(per ton in Zone 5 a/)

Date Price Was Adopted	8-3-3		8-4-4	8-3-3 Tobacco Grade	16 per-cent Superphos-phate	Nitrate of Soda	20 percent Kainit
	(Nov. & Dec. 1933 mixes and superphosphates in carlots--later lists optional)					(Less than Carlots in carlots with mixed goods)	
	List	Net Cash		List Prices		List Prices	
1933							
Nov. 15*	$24.69	$20.99	$27.45	$26.54	$19.46	$43.32	$25.31
Dec. 1*	26.25	22.05	29.35	28.75	20.55	42.55	25.65
1934							
Feb. 1	25.85	21.71	28.45	28.35	21.20	42.40	28.15
Feb. 5						42.78	27.20
June 30			28.35			45.65	26.60
July 26	24.95	20.96	27.50	27.45	20.50	42.25	25.00
Aug. 28				26.95			
Sept. 29		21.21				41.07	
Nov. 2	26.70	23.23	29.30	29.20	22.15	39.65	23.05
Nov. 19							22.20

Source: Whitney, Simon, Fertilizer Industry Price Study, NRA Preliminary Report, December 15, 1935. p. 23.

a/ Royster's (the price leader's) prices.

(*) Bureau of Agricultural Economics, Division of Agricultural Finance, Mimeographed report, November 1934; National Fertilizer Association, "American Fertilizer Practices, A Series of Reports Relating to the Use of Commercial Plant Food Presenting Information Obtained by a Survey Among 48,000 Farmers in 35 States". 1929, p. 61.

Statements made by Mr. Brand, Secretary of the National Fertilizer Association, are to the effect that although prices to farmers were increased only about 15 per cent under the NRA code, the net price to fertilizer producers was increased about 34 per cent due to a reduction in the profit margin of distributors. (*)

An analysis of the price series of the Bureau of Labor Statistics for Fertilizer during the pre-code, code and post-code periods indicates the following:

(1) An upward trend in Fertilizer prices began about two months before the effective date of the Code, November 10, 1933.

(2) This upward trend continued under the Code until the cost formula was approved in February, 1934; thereafter prices remained quite stable until the termination of NRA.

(3) There was a post-code break in Fertilizer prices, beginning in June, 1935, and continuing until prices soon reached about the same level as existed when the code became effective. (**)

The Fertilizer Industry Price Study gives the following account of the frequency of price changes under the code:

TABLE IV

NUMBER OF PRICE CHANGES

Item	Shown by Price Files, Zone 5	Shown by Bureau of Labor Stat. Code Period	Shown by Bureau of Labor Stat. 18 month average, Jan., 1926-June, 1933
Grade 8-3-3 fertilizer	4	4	3
Grade 8-4-4 fertilizer	5	not included	not included
Superphosphate	4	2	7
Nitrate of Soda	7	2	12
Kainit	7	4	2

Source: Whitney, Simon, Fertilizer Industry Price Study, December 15, 1935. p. 25.

Commenting on the table, Dr. Whitney observed:

"There is no significant tendency observable under the Code, with the possible exception of the decrease in number of price changes on superphosphate. While nitrate of soda prices also

(*) NRA Public Hearing on Prices, January 9, 1935, Transcript of Hearing, p. 138, NRA files.

(**) These data are not presented as conclusive evidence of precise price movements but merely as one indication of the general trend of Fertilizer prices.

appear to have been stabilized to some extent, this was for all practical purposes outside the sphere of influence of the Code."

And continuing, on the size of price changes:

"In comparing the size of price changes under the Code with the average size of changes in previous years, the Bureau of Labor Statistics series again furnish the only basis of comparison. On grade 8-3-3, the average size of the 4 changes occuring under the code was 79 cents a ton; while the 14 changes occuring from January, 1926, through June, 1933 averaged $1.10 per ton. On superphosphate, the two changes under the Code averaged 25 cents a ton; the 34 changes prior to the Code averaged 26 cents a ton. No significant difference is apparent." (*)

These comparisons were made to determine if there were differences in the behavior of fertilizer prices during the pre-code and code periods. The price series compiled by the Bureau of Labor Statistics were used for the pre-code years because there were no filed prices available for that period.

The above comparisons, however, do not tell the whole story for two reasons. (**) First, the price series of the Bureau of Labor Statistics do not take into consideration fluctuations in some of the more inaccessible elements of the prices and therefore provide an imperfect comparison with prices filed under the NRA code. Second, certain other changes (such as a change to a "delivered-to-the farm" basis, a change in treatment of dealers, and reduced trucking allowances) are not taken into consideration in the comparisons shown, although they meant very definite changes in prices to certain interested groups, including consumers dealers, and producers.

(*) Whitney, Simon, Fertilizer Industry Price Study, December 15, 1935, pp. 25-26.

(**) Dr. Whitney is, of course, aware of these limitations.

c. Asphalt Shingle and Roofing

While a complete collection of price filings and merchandising plans are not available for the asphalt shingle and roofing industry (for either the pre-NRA code, or post-code periods), the general trends indicated by the partial collection of price filings and the Bureau of Labor Statistics price series appear to be somewhat similar.(*)

These data indicate that asphalt shingles were comparatively high-priced during 1926-1929, but that the trend was definitely downward. There was a decided break in prices late in 1927 and early in 1928; a recovery in 1928 and a relatively high and stable plateau during 1931 but new breaks in 1930 and early in 1933. Slate-surfaced roofing and medium prepared roofing were much lower in price than either individual or strip shingles, the former type of shingle usually being the more costly. The slate-surfaced and prepared roofings were also usually more stable in price than the shingles.

During the period of operation under NRA asphalt shingles and roofings showed the following increases in price:

TABLE V

Course of Asphalt Shingle and Roofing Prices
From March 1933 to End of Code Period
(Value per square)

Item	(Dollars) March 1933 - May 1935		Change during Period (Dollars)	(Percent)
Individual shingles	3.49	4.95	+ 1.46	+ 41.8
Strip Shingles	3.06	4.57	+ 1.51	+ 49.3
Slate surfaced roofing	1.36	1.77	+ .41	+ 30.1
Medium prepared roofing	1.33	1.44	+ .11	+ 8.3

Source: United States Bureau of Labor Statistics, Wholesale Prices

A price differential by certain "troublesome" small enterprises was permitted by the other members of the industry. In some cases this differential amounted to as much as 7½%. The theory behind the differential was that it is better to allow such small price cutters a stated differential which has been definitely agreed upon, than to run the risk these small concerns may "run wild"; since in the former case other producers "know about where they are." (**)

(*) See Chart II Appendix A, (Price Filing in the Asphalt Shingle and Roofing Industry, NRA Price Filing Study, 1936)

(**) Interview by Mr. Frank Stocking of the Price Filing Unit with officials 9826 of the Asphalt Shingle and Roofing Institute, New York City, January 9, 10, 1936.

Following the termination of NRA, there appears to have been a minor dip in the price curve for asphalt shingles, which was soon followed by a rather strong recovery. During the latter part of November and the month of December, 1935, however, prices seem to have receded quite sharply again. Slate surfaced and prepared roofing prices seem to have taken about the same general course as those of shingles during the post-code period; however, the fluctuations on these lower-priced products have not been so pronounced.

3. Other Industries for which There is Some Evidence of Upward Price Trends

The price structure of the magnet wire group of the electrical manufacturing industry showed comparatively little change between the original and final filings. The principal change seems to have been caused by two increases in the base price amounting in all to 1½¢ per pound.

There were also increased in various extras ranging from 1 to 15 percent. However, the general level of prices was probably reduced during the code due to increased premiums given to quantity purchasers.

A letter from the administration member to the deputy administrator for the carbon dioxide industry, dated May 6, 1935, has the following answers to several questions apparently put by the Deputy:

Question 3: "Has price filing in the industry a tendency to bring about a uniformity of price or any tendency to raise or decrease the price?"

Answer: "To some extent. I might say that the effect of price filing has been to bring about the stabilization of prices and enable the sales manager of a company to discount many of the reports of salesmen about price cutting, due to their inability to get sufficient business."

Question 4: "What is the effect of price filing on the small enterprise?"

Answer: "The effect of price filing on the small enterprise has been that it has brought into a concrete form definite information about the competition of the large manufacturers rather than conjecture and rumors and its success therefore has been one of stabilization. The large manufacturers will not cut their prices for fear of criticism of being one of the ones who initiated the downward spiral and the small manufacturers are safe in holding to their prices when they know that the large producers are not trying to cut under them."

That situations were not always so ideal as this is indicated by a later paragraph in the same statement which reads as follows:

"I understand that at the present time there is a complaint in the

Los Angeles area by a small member of the industry that the large producers, the liquid carbonic and new ice companies, are cutting prices to a destructive level. From the facts I have been able to obtain it is my understanding that the complainants have only been in business since last September and in order to gain a foothold initiated prices below the existing market quotations. When the large producers discovered these chiseling tactics they cut their prices to meet the competition. The complaint existing in Washington at this time by the small producer is the result."

There is some additional evidence, fragmentary but suggestive, that the Los Angeles situation was duplicated in certain other areas.(*)

4. Samples of Stable Price Levels.

Some of the industries operating under open-price provisions exhibited relatively stable price levels during the period in which the NRA codes were in effect.

a. Laminated Phenolic Products.

One of the industrial groups which exhibited a comparatively stable price level under NRA was the Laminated phenolic products group of the electrical manufacturing industry.

This group, which is composed of three types of members /(1) large electrical companies producing partly for their own use in further manufacture; (2) vulcanized fibre and phenolic fibre manufacturers; and (3) fabricators or agents of either of the first two subgroups/ had experienced some price cutting prior to NRA. Since the group's products are utilized chiefly as raw materials in the electrical and other manufacturing industries, its market had been hard hit by the general inactivity of manufacturing during the depression. The keen competition resulting caused most members of the industry to seek and accept any business available, regardless of the size of the order. This, in turn, seems to have resulted in pressure upon the fabricator to cut prices still further in order to maintain his position. (**)

It is believed that the price call of the Laminated Phenolic Products Industry was primarily for the purpose of trying to get the members of the group to cooperate more closely and to stabilize prices. Another probable factor was the development of new markets (outside of the electrical industry); such a situation would appear to make it advisable for the group to have additional information regarding products and the prices at which they were being marketed by various members in these new fields.

The advent and subsequent operation of price filing caused no very material change in the price structure of the industry; however, it probably did exert a steadying influence inasmuch as the relatively minor price changes which did occur took place in a more orderly manner and any tendencies for the price level to sag appear to have been corrected.

(*) See memorandum to the Administrator from Mercer Johnston, Consumers Advisory Board, Aug. 7, 1934. NRA files.

(**) See Caesar, Albert, Laminated Phenolic Products, preliminary paper, NRA Price Filing Studies of the Electrical Manufacturing Industry, 9826 1936, pp. 1-6, NRA files.

List prices on washers and other fabricated products have remain unchanged for many years and are said to be identical with those which have been used for a long time in the Vulcanized Fibre Industry. There were no changes in the list prices of laminated phenolic products during the period of operation under NRA.

Such price changes as occurred seem usually to have taken place in discounts. A typical change is described as follows:

> "One company would change a discount; another company within a few days might meet or even 'over-shoot' that price; others would file to meet one or the other, and eventually, after several revisions, the entire industry would end up on a common level only slightly different from the original. Changes in price or discounts were not extensive. In fact, in the case of the discount on washers each company made as many as three or four filings to effect a change of not more than 2 percent on large quantities." (*)

The intermediate filings granted larger discounts than the final filings. The former seem to have been the result of dabbling in special discounts to specific customers by several of the companies; this practice was finally checked by one of the larger companies which took a definite stand on the matter, defined the class of customers to whom the discount would apply and then quoted a standard discount to these customers. Most of the important producers followed this leadership.

One other development which aided in standardizing and stabilizing the price level of the industry was bringing the lone recalcitrant member into line with the rest of the group. Company number 25 was the only one of the 13 manufacturers of the primary product whose filings were out of line at the advent of open price activity. Two or three months after this, however, this company changed to the same price structure as the others and continued so until termination of the code.

The percentage of change in prices during the code period varied considerably with the type of material. Using tubing as an example, the basic discounts ranged from 15 percent to as high as 60 percent depending on the grade of material. Thus, there was a greater production in price on the expensive grades and less reduction (on the cheaper grades).

The products of the different manufacturers are very similar in composition, physical properties and finish. This makes the relatively small number of minor changes all the more remarkable since there seems to be a tendency (which was rather marked prior to the code) for competition to center on price.

b. Steel Castings.

It has been pointed out previously (Table I) that while the price trends of certain steel castings were upward during the period under NRA those of others were either stable or downward. Three castings which exhibited a relatively stable price level during this period were "Aeronautical Castings N.O.C.B.N., "Automobile Brake Drums- 1 to 100 pounds", and"Cylinders of the Hydraulic Accumulator Type". The following sections explain the price behavior of these relatively stable castings.

(*) ibid., pp. 7-8

(1) Aeronautical Castings, N.O.C.B.N.:(*) The first recorded filing on this classification was schedule "C", which was sent in by Foundry 504 on December 12, 1933, and constituted one of the lowest schedules (highest prices) filed for any classification under the code. This is partially accounted for by the fact that this class of casting is usually very small and more expensive to cast than the larger types.

The only price schedule filed on this product which deviated from the "C" level was a higher one, "B", filed by Foundry 503 on April 18, 1934. Later, on July 4, 1934, this foundry returned to the level of "C". With this one temporary exception, the price level for this classification remained unchanged throughout the code period.

(2) Automobile Brake Drums - 1 to 100 Pounds: For this product, schedule "I", originally filed before the December 5th report on the price filing plan to industry members by the code authority, was the established level throughout the code period in all divisions. Four foundries in Division VIII, filed "H", a lower level, on March 20, 1934, but in a few days most of them were back up to "I". Foundry 622 (usually the price leader) filed schedule "I" on August 23, 1934, and was followed by 25 foundries in division VI. This action definitely established the level of prices on most automobile castings.

(3) Cylinders of the Hydraulic Accumulator Type: The December 5th report of the code authority listed the schedule for this casting as "G" and it remained at this level during the duration of NRA. There were 48 "G" filings for this product, including the foundries in Division VIII, (California) which in this case did not file a schedule higher than that prevailing in other divisions.

c. Electric Fans.

Some idea of the different behavior of the price levels for different types of electric fans is given in Table VI. The main point is that whereas the prices of the quality or higher priced fans were well maintained during the code period those for the cheaper 8-inch models showed a downward trend. The medium priced 10-inch fans were somewhat more stable than the 8-inch but less so than the more costly oscillating models.

Another point of interest is the shifting of the levels of the different competitors within the 8-inch and 10-inch groups.

While it appeared to be difficult to maintain the level of $4.60 for 8-inch fans , due no doubt to the intense price competition from the same sized models of different quality at $2.75, $1.75 and $1.50, the manufacturers of the latter two fans apparently discovered that they had more of a price differential than they really needed and were able to increase their prices from $1.50 to $1.79 and from $1.75 to $1.84, respectively, and still maintain a competitive advantage sufficient for thier purposes. At the same time, one of the competitors who formerly sold at $4.60 sought a new price niche for his product at $3.20. Four of the eight who originally sold at $4.60 dropped to $3.95. The two who maintained the $4.60 price were the price leaders of the group; one of these probably added a sufficient number of minor improvements to justify retention of the $4.60 price; the

(*) N.O.C.B.N. meant "not otherwise classified by name."

other appeared to more indifferent to the price competition in this group and was probably relying upon the prestige of firm name and general reputation to move the model at the original price. The other two competitors who originally filed a price of $4.60 discontinued making 8-inch fans. The final result was a much more gradual gradation of price as well as a tendency for prices to gravitate toward the center of the price range. In other words, each competitor seemed to be trying to establish some kind of an individual price level or niche of his own, apparently in an effort to appeal to the trade interested in buying a relatively cheap fan at that particular range. The only two companies maintaining the original price were the outstanding leaders in the industry; these were in a position to rely more on general prestige and apparently were not so sensitive to price competition, even in the low-priced models, although even here one of them was apparently offering a slightly improved model for the same money at the end of the code period.

A somewhat similar tendency, although not so pronounced, appeared in the case of 10-inch fans; here the two "non-standard" competitors who originally quoted $12.50 and $9.95, instead of the "standard" level of $12.95, dropped to new and lower levels of $10.00 and $7.75, respectively, apparently in an effort to appeal to buyers who might be interested in purchasing a 10-inch fan at an intermediate level between the "standard" levels for 8-inch and 10-inch fans.

Apparently no shifts were made among the competitors so far as their quotations on oscillating fans were concerned; all continued uniformly to quote $22.50.

Table VI contrasts the original and final price range, including 8-inch and 10-inch fans.(*)

It should be noted however, that although the change in quantity discounts was identical for all groups, it may not have affected them equally, particularly where the discount was based on the value of the order.

(*) While the comparisons are based on list prices only in this case, these appear to tell the general story and between the three types of fans inasmuch as the other price elements appear to have moved similarly to the list prices or in approximately the same way for all three classes of fans. The list price would not reflect the action of certain manufacturers who closed out some models at discounts as great as 55 percent; however, since most of the "close-outs" appear to have affected 8-inch fans, this merely emphasizes the situation as indicated in Table VI.

TABLE VI

THE ORIGINAL AND FINAL PRICE RANGES FOR ELECTRIC FANS UNDER THE NRA CODE

(List prices for 8-inch and 10-inch fans)

Type of Fan	Original Filing List Prices	Original Filing No. of Cos.	Final Filing List Prices	Final Filing No. of Cos.
10-inch	$12.95	8	$12.95	8
"	12.50	1		
"	(10.50	1b/	10.00	1
"	(9.95)	1b/	7.75	1
8-inch	4.60	9	4.60	2c/
"	(4.95)	1a/	3.95	4
"			3.20	1
"	2.75	1	2.75	1
"			1.84	1
"	1.75	1		
"			1.79	1
"	1.50	1		
Average All Fans	$7.88	22	7.78	20
Average 8-in. Fans	3.95	12	3.46	10
Average 10-inch fans	12.60	10	12.11	10

a/ For eight-inch fans one company originally filed a price of $4.95 for the Western trade and $4.60 on the same item for the Eastern.

b/ Originally, this company filed a price of $10.50 for the Western trade and $9.95 for the same item in the East.

c/ Two companies discontinued making eight-inch fans.

Source: Compiled from the worksheets of the Price Filing Study of the Electrical Manufacturing Industry, NRA files.

d. Food Service Equipment

The price structure of this group was relatively simple in character and underwent comparatively few significant changes during the period of the code. Products of the group varied so widely in design and price that there was little comparability and no basis for effective product standardization or classification. Furthermore, the group lacked cohesion between its rather large number of comparatively small members, whose diversified interests tended to break the Industry up into several smaller competitive groups. Outside their own groups, members appeared to pay slight attention to one another or to price filing.

For the food service equipment group, as a whole, price filing probably served as an educational device in one sense, inasmuch as it divulged, for the first time apparently, fairly complete information concerning the type of product which each member of the group manufactured, and the marketing methods employed.

As to prices, price filing apparently had very little influence upon these. Terms of payment in the group seemed to have lacked effective uniformity, inasmuch as many customers were in the habit of availing themselves of the cash discount provided in the stated terms of payment, but often failed to meet their bills on the dates specified. Such irregularities seemed to have been condoned by the manufacturers.

e. Fuse Group, Electrical Manufacturing Industry

What has been said above, with respect to the apparent effects of price filing in the food service equipment group applies also, except perhaps as to cash discounts, to the Fuse Group of the same Industry.

3. Industries in which the Price Level Declined

In a considerable number of industries with open-price codes price levels were lower at the termination of NRA than at the time of original filing. In some instances this fact may be somewhat misleading due to anticipation of the influence of the codes before they went into effect or the reporting of very high prices in the original filings. It often happened that the market would not carry these high prices and the levels had to be reduced again. The resulting prices may have been either higher or lower than those in effect prior to the anticipation of the codes or their adoption.

a. Flexible Cord.

Most types of flexible cord exhibited a downward trend in price during the period of the price call although large increases were made in list prices shortly after the price filing plan became operative.

The following tables show list prices, high and low discounts, and net prices for a type of flexible cord known as "Type C F Number 18 Rayon."

TABLE VII.

PRICE TREND OF TYPE C F NUMBER 18 RAYON FLEXIBLE CORD

Date Filed:	List Prices:	Discounts: High:	Low:	Net Prices: High:	Low:
9/7/33	$6.50	10%	10%	$5.85	$5.85
10/2/33	14.50	65	40	8.70	5.08
2/6/34	14.50	60	60	5.80	5.80
3/15/34	4.80	5	5	4.54	4.54
10/9/34	5.20	5	5	4.94	4.94
2/18/35a/	5.20	15	15	4.42	4.42

Final net price was 25 per cent lower than the original

a/ The price call for the flexible cord division was cancelled prior to the Schechter Decision.

Source: Worksheets for the Flexible Cord Group, NRA Price Filing Studies of the Electrical Manufacturing Industry.

TABLE VIII.

PRICE TREND OF NUMBER 18-1/64 RADIO WIRE, SOLID TINNED

Date Filed:	List Prices:	Discounts: High:	Low:	Net Prices: High:	Low:
10/6/33	$2.10	65%	40$	$1.26	$0.868
11/15/33	2.65	68	60	1.06	0.868
2/23/34	2.65	68	68	0.868	0.868
3/15/34	2.10	65	60	0.84	0.735
4/16/34	.85	10	List Price Plus 15%	0.978	0.765
7/10/34	.85	20	Quantity: 5% 25%	Quantity Prices, 0.808 to	0.638
7/23/34 a/	.85	10	Quantity:b/ List plus 15%	0.978	0.765
			Jobbers, chains mail order houses, 5%, any quantity		0.806

a/ The price call for the Flexible Cord Division was cancelled prior to the Schechter decision.

b/ The greatest market for this type of cord is in radio manufacture and the quantity discounts shown on July 23, 1934, reflect the level of prices on this date fairly accurately. Most manufacturers also buy in large quantities and are able to take advantage of the lowest price. Therefore, manufacturers buying large quantities paid 9 per cent less at the close than at the beginning of price filing.

Source: Worksheets for the Flexible Cord Division, NRA Price Filing
3826 Studies of the Electrical Manufacturing Industry.

Prices filed for another type of flexible cord varied as indicated below.

TABLE IX.

LIST PRICES, DISCOUNTS AND MOST FAVORABLE NET PRICES FOR P O NUMBER 18-1/64 RAYON

Date Filed:	List Prices: (*)	Most Favorable Discount:	Net Price:
9/7/33	$11.50	10 per cent	$10.35
9/22/33	26.00	65 per cent	9.10
1/15/34	26.00	60 " "	10.40
2/16/34	26.00	60 " "	10.40
3/24/34	8.50	5 " "	8.08
6/21/34	8.50	10 " "	7.25
10/15/34	8.90	10 " "	8.11
2/10/35	8.90	15 " "	7.57

In this case, it will be noticed that large variations in the list prices were accompanied by offsetting variations in discounts, so that the fluctuation in net prices was decidedly less than in list prices.

It is probable that the declines in the prices of the four types of flexible cord were even greater than indicated by the prices filed since members apparently did not adhere to these prices very well. Furthermore, compliance seems to have decreased as time passed.

The flexible cord group had no less than 39 customer classifications under the code. One example of differences in the movement of prices to different classes of purchasers under such a plan appears in the table given below. This table shows the variation between the least and the most favorable treatment of customers by the manufacturers of one type of flexible cord from early in September, 1933, through the first part of 1935.(**)

(*) Note: All companies filed the same list price. The original file under the Code became effective September 9, 1933.

(**) Any conclusions which may be drawn from the price information filed by the Flexible Cord Group must necessarily be subject to the qualifications imposed by the fact that the members of this group did not adhere to the schedules filed in many cases.

TABLE K.

VARIATION IN THE PRICES TO PURCHASERS
OF ONE TYPE OF FLEXIBLE CORD

Date Filed:	List Price:	Discounts High	Discounts Low	Net Price:
9/7/33	$14.00	10%	10%	To all, $12.60
9/22/33	$31.00	65%	40%	High, $18.60 Low, 10.85 Spread 7.75
2/16/34	31.60	60%	60%	To all, $12.40
3/24/34	13.60	5%	5%	To all, $12.92
8/21/34	13.60	10%	5%	High, $12.92 Low, 12.24 Spread, .68
10/15/34	14.40	10%	5%	High, $13.68 Low, 12.90 Spread, .78
2/18/35	14.40	15%	15%	To all, $12.24

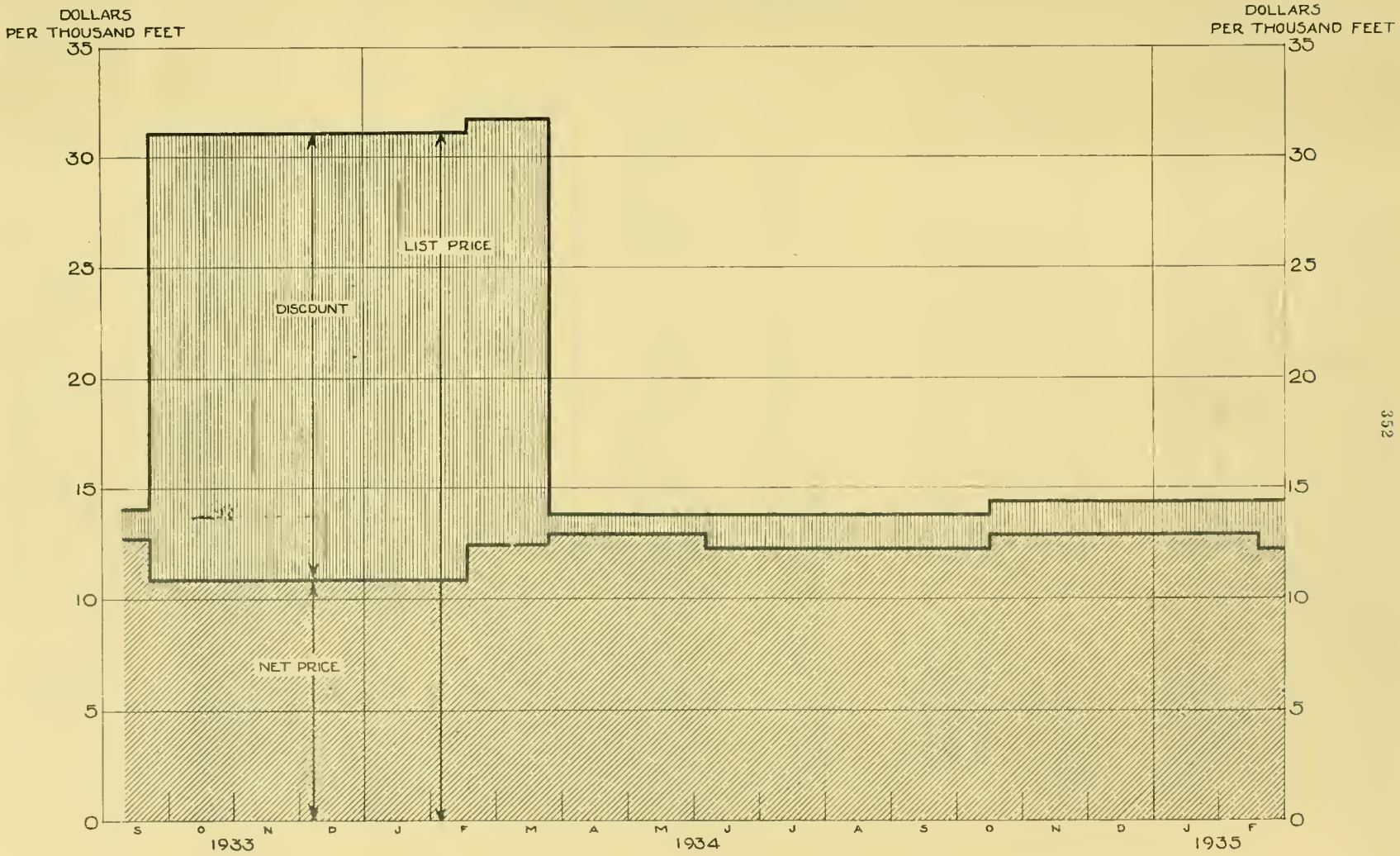
Source: Worksheets and Chronological Histories for the Flexible Cord Group. Price Filing Studies of the Electrical Manufacturing Industry.

Chart I following presents this data in graphic form; the low discounts only are plotted.

9526

LIST PRICES, DISCOUNTS, AND NET PRICES FOR TYPE S.J. No.18, FLEXIBLE CORD

SEPT. 1933 — FEB. 1935



352

SOURCE: COMPILED FROM DATA MADE AVAILABLE BY THE NATIONAL ELECTRICAL MANUFACTURERS' ASSOCIATION

NRA
DIVISION OF REVIEW
STATISTICS SECTION
No. 494

A former member of the trade association of the electrical manufacturing industry has related how the creation of a new customer classification was used in an attempt to stop indirect price cutting in the flexible cord industry under the NRA code. His account is as follows:

> "With the filing of September 22, 1933, /the first filing under the code had been made on September 7, 1933 for most types of flexible cord/ there appeared a new customer classification, known as 'Wiring Device Manufacturers Who have a Listing with Class A Chain Stores, and Who Operate Under a Sales Agency Contract.'
>
> "This classification was made in an effort to correct a situation, which had existed for a long time, whereby a manufacturer would designate an agent (not a legal 'agent') and a contract would be signed between them. The agent would obtain a 'listing' with Class A chains which would give him a preferential position in the chains' purchases of material. This arrangement, all 'under cover' made it possible for the manufacturer to sell indirectly to the chains without the prices being made public.
>
> "The effort on the part of the more responsible manufacturers to bring all such agreements out into the open failed, however, and the classification was soon dropped."

An interesting illustration of leadership is seen in the price filing history of this flexible cord group. The group is alleged to have had two main leaders, one of which (Company 8) initiated most of the important changes in the direction of standardization while the other (Company 25) was responsible for most of the initial shifts toward a lower price level. Chronological records for nine of the most active and representative members (both large and small) of the flexible cord group show all of the price filings made by these companies and also whether they were the first to file a given price or whether they were following the leadership of another members, and, if so, whom. The analysis of these filings may be summarized as follows:

(1) Most of the filings which initiated a change in net prices or customer classifications were made by one or the other of the two companies mentioned above. (8 or 25).

(2) Such changes were adopted by all other companies affected, some immediately and some not for a month or so. For example, Company 7 made twelve filings affecting the prices of major lines; nine of these were to meet changes initiated either by Company 8 or 25; the remaining three met prices originated by three other companies.

In general, the flexible cord industry, as contrasted with an industry such as the steel castings, affords an example of a group which apparently failed to evolve a unified price filing plan, and which lacked the cohesion necessary to make effective progress in their attempt to standardize the price structure. The group was handicapped by the entrance of new sources of supply into the field, and it was also harassed by

certain small members who refused to comply with filed prices. The flexible cord group, in fact, never approached an equilibrium as did the steel castings industry. It is an outstanding example of price flexibility among all of the industries studied from the price filing point of view. The entire code period, so far as the flexible cord industry was concerned, was one of changing from first one price phase to another, and the group at last voluntarily cancelled its price call before the termination of the codes, in admission of failure and in the belief that price filing was accentuating the competitive battle by provoking and facilitating the "retaliatory" filing of prices by "bitter competitors."

b. Steel Casting.

It will be recalled that Table I indicated that some steel castings rose in price while others showed no change or decline.

Three representative steel castings showing declines in price under NRA were "Combine Harvester Castings, N.O.C.B.N.", "Railroad Locomotive Driving Boxes (Friction Type)", and "Rolling Mill and Steel Plant Roll Housings and Caps".

(1) Combine Harvester Castings, N.O.C.B.N.: For this type of casting, the first price schedule filed was "M"; from this level the price moved down through later filings to "P", then up to "N", and then down to "O", "P", "Q", "R", and "S" in Division VI, the division in which the great volume of the product is marketed.

(2) Railroad Locomotive Driving Boxes (Friction Type): This class of casting revealed an interesting manipulation of prices within a schedule by changes in the N.Q.D. (No Quantity Discount) regulation. The first price schedule published for this casting (in the Code Authority Report of December 5) was "P" under the 1 to 3 pieces column of the schedule operative and allowed no reduction in price for any quantity taken. On March 2, 1934, several foundries filed "P" but with the N.Q.D. provision moved out to 99 pieces; this was, in effect, a price reduction. On October 29, 1934, Foundries, 407, 105, and 422 jointly filed Schedule "P" with N.Q.D. over 249 pieces, a new low price. When the Fourth Quarterly Report was published December 19, 1934, Schedule "P", N.Q.D. over 249 pieces was given as the prevailing level in all divisions except Division VIII (California). On January 2, 1935, Foundries 805 and 806 jointly filed this level. Later, five other foundries in division VI followed with "same as" filings at this level. The fifth quarterly report, March 23, 1935, indicated that this level prevailed uniformly in all divisions.

(3) Rolling mill and steel plant roll housings and caps: The December 5th Report by the code authority listed Schedule "Q" as the level recommended for this product. In February, 1934, Foundries 501, 508 and 713 filed this schedule without quantity discounts. On March 21, Foundries 407, 424 and 420 jointly filed a new low price in the form of Schedule "Q" with all quantity differentials available therein. Several other foundries met this price and the first quarterly report of the code authority (issued March 31, 1934) listed it as the prevailing level for all divisions. Later, in the second quarterly report, June 16, 1934, the prevailing level was given as Schedule "Q", N.Q.D. over 2,499 pieces by the Code Authority. On August 25, 1934, Foundry 622 filed this arrangement and was followed by 25 members of Division VI. The fourth and fifth quarterly reports listed this as the prevailing level in all divisions. (*)

(*) Price Filing in the Steel Casting Industry., N.R.A. Price Filing Studies, 1936, (this report, Appendix B.)

c. Radio Receiving Tubes.

Radio Tube Manufacture, being closely related to the Radio Industry proper, shares many of its characteristics and problems; both are relatively new and unseasoned, contain personalities and exhibit business customs and practices drawn from a number of different fields, and have many and varied channels of distribution, including replacement sales through distributors, sales to set manufacturers and to private brand outlets. Both also depend heavily on volume and feel the necessity for constant research and development. The rapid rate of change which results makes cost accounting uncertain and often more-or-less useless; it also tends to make for keen competition on a price basis. Price competition is intensified by the fact that tubes are made to standard specifications. As might be expected, the radio tube industry was hard hit by the depression; the mortality among manufacturers, high even in prosperity, became appalling as a serious slump in volume developed and the normally keen price competition was intensified.

The primary purpose of the original price call, which was issued on November 3, 1933, was to stabilize prices, although the industry was also interested in obtaining any other benefits which might accrue from open price activity. (*)

Examination of the original and final price structures of the radio receiving tube group of the electrical manufacturing industry shows that a very definite reduction in price level occurred during the code period.

Since many of the price lists and discounts first filed were dated previous to the price call they also afford some indication of about what the pre-code level was, unless secret and special discounts were prevalent.

This original filing revealed that list prices were quoted to all types of customers except radio receiving set manufacturers, who received net quotations which were lower than those available to any other class of trade. Dealers and jobbers received the most favorable treatment accorded the replacement and distributive channels.

The standard list prices to dealers and jobbers were usually subject to discounts of 50 or 55 per cent while the net prices quoted set manufacturers were based on purchases of more or less than one million tubes per year.

In addition to the "standard" discounts, other discounts were quoted on consignment. These last were about equal to the discounts allowed open accounts; however, the other terms extended were not so favorable to open accounts.

The "non-standard" terms included almost every possible special arrangement and condition to be imagined. Among these may be mentioned special net prices on, or bonus plans for, particular tubes; "quantity"

(*) Caesar, Albert, Radio Receiving Tubes, Preliminary Paper, NRA 9826 Price Filing Studies of the Electrical Manufacturing Industry, 1936 pp. 1-4, NRA files.

discounts based upon number of tubes, value of order, turnover, annual purchases and geographical location; geographical differentials based on the standard list and on specific tubes; discounts on "no quality specification, unbranded"; "private brand"; "special quality specification, branded"; "particular quality specification, branded"; and assorted brands. There was also an almost endless list of special allowances including those for sales effort, advertising promotion, consignment, closing out consignment, reconsignment, et cetera. (*)

Customer classes were not standard or well-defined. For example, types of distributors mentioned included "small jobbers","large jobber", "dealer", "dealer-jobber", "large dealer", "dealers" (large or exceptional retailers), "dealers-large retailers sold on a jobber basis".

Freight was usually F.O.B. plant or F.O.B. destination and the terms of payment were generally 2 per cent in 10 days, net 30 days; however, these were usually merely points of departure and the exceptions were many and varied.

The final price structure, insofar as one can be said to have existed, showed no important changes in customer classification, amount of general discounts, general allowances, multiplicity of terms, et cetera. However, there were three significant changes:

(1) List prices were much lower; in some instances they were less than 50 per cent of those originally reported.

(2) A group of distributors usually loosely defined as "jobbers" had been selected as the most advantageous channel of distribution and accorded treatment equal to or even more favorable than that extended to the manufacturers of radio sets.

(3) Consignment sales had practically disappeared.

The intensified competition for the jobber market began during the summer of 1934 when prices to this type of customers were reduced about one-third. This competition continued into the spring of 1935 with the result that the price level was reduced more than 50 per cent below that of November, 1933. It is difficult to explain this trend in competition except by the fact that Company Number 13, the leader in the industry, apparently decided that the jobber offered a good channel of distribution and went after this market; the other companies appear to have following the leader. At any rate, the types of special allowances to jobbers were increased considerably. Furthermore, the terms and conditions of sale indicate that "the Industry was rapidly approaching a co condition where each customer would be treated individually." (**)

(*) See Caesar, Albert, Radio Receiving Tubes, preliminary paper, NRA Price Filing Studies of the Electrical Manufacturing Industry, 1936. pp.5-6

(**) Ibid., p.10.

Consignment probably was practically eliminated, temporarily at least, because the conditions which went with this device undoubtedly destroyed much of its usefulness during this period. Mr. Caesar cites an example where Q a manufacturer offered a very attractive consignment proposition. Within sixty days of his offer, he made a new proposition to the effect that consignments could be closed out at prices in effect about thirty days prior to the original consignment offer, which prices were considerably higher than the prices in effect at the time of the consignment offer and at the time of the cancellation o offer." (*)

The large number and continuity of the filings, especially by the larger companies, indicate that the competition in this industry was active, price-minded and quite sensitive even to minor changes in price elements or other competitive conditions.

d. Fractional Horse Power Motors.

Although the stated purpose of instituting price filing in the fractional horse power motor group of the electrical manufacturing industry was "to do something about quantity discounts" the premiums allowed volume buyers increased considerably. Later, the industry found it necessary to make reductions to all other customer groups. This apparently was forced by the resentment of the less-favored classes of customers and the tendency of the "non-standard" companies to offer greater discounts to the customer classes least favored by the "standard" members. List prices changed very little in comparison with these discounts. The net result, however, was to lower the level of prices considerably and the group finally cancelled its price call prior to the Schechter decision.

e. Macaroni.

The following excerpts from the Code History for the Macaroni industry indicate what happened to the price level:

> "The system of price filing worked reasonably well in the Code for about eight or ten months; thereafter, with the disastrous fall of prices, members of the Industry left their prices on file and sold as they saw fit.
>
> "The Code Authority fought a long and valiant fight to support the price level in the Industry. It was a battle doomed from the first to failure even in spite of the extra-legal methods often used.
>
> "....After the elements of cost were approved, the Code Authority started laying down all sorts of rules concerning prices which could or could not be made, interpreting the provisions of the Code as it saw fit, requiring filing of all contracts, limiting diversion of brokerage, and in a business-like way attempted to control all matters relating to prices. The actions appeared in the minutes of the second meeting of the Code Authority held on April 7, 1934, and the Code Authority was immediately censured for the actions which to all intents and purposes were ammendments to the Code and interpretation without sanction of the Administration

(*) Ibid., . 9

"....As a result of this reprimand the Code Authority found its hands tied in dealing with the price situation by other than persuasive means. Those members of the Industry who were antagonistic to the Code defeated the entire progress of the price-filing system by indulging, or at least saying they were indulging, in open-end contracts (that is without date of termination) to deliver at a fixed price. On a rising market for raw materials, the large and efficient members of the Industry cut the price level down saying that they were fulfilling long term contracts which the Code Authority was not permitted to see.

"...As a result of this situation, the Code Authority came forward with its amendments to limit contracts to ninety days and require that they be signed and irrevocable. If the delivery price differed from the price on file, the contract was to be filed with the Code Authority.

"After the passage of this amendment, the situation was slightly ameliorated but within a short time the price level went to the lowest level in the Industry, taking into account the cost of raw materials which were fairly high on account of the processing tax.

"...The failure of the price filing system in the latter stages of this Code was not due to inherent weakness in the system but to the failure of the Code Authority to get compliance with the sales-below-cost provision.

"...It is Mr. Hoskins' (former Chairman of the Code Authority) belief that in spite of the inability of the Code Authority to bring about compliance with the price provisions of the Code and in spite of general discouragement with the Code Authority's efforts on all sides with reference to this issue, actually the efforts of the Code Authority did keep the price level from going much lower and were very beneficial in that respect." (*)

In December, 1934, the chairman of the code authority expressed the opinion(**) that open price provisions cannot be enforced because

"Unless there is a step below which no manufacturer can sell, the tendency of open prices is to make retaliation for price cutting quicker than otherwise. Ordinarily, this very condition would make open prices effective as a medium to keep up prices, but it must be always borne in mind that

(*) Code History for the Macaroni Industry, page 87 and following, Central Records Section.

(**) To one who is now a member of the price filing unit.

in the Macaroni Industry at least 75 per cent of the individual manufacturers have just taken off their overalls and become business men by that gesture rather than by qualifying as 'business men' by experience and education in business."

One aspect of the intensity of competition was evidently an increase in sales made at a distance from the producers' customary market without extra charge to cover this increased selling expense. This practice and the complaints against it were similar to those in the builders' supplies industry. (*)

f. Domestic Electric Heating Appliances

In the opinion of producers in this group, the only effect of price filing was to create ill feeling between manufacturers and to give the chiseler and price cutter an advantage. (**) Apparently the basis for this judgment was the development of new discounts and allowances during the price filing period. Originally very few concerns made allowances for advertising, demonstration, and other promotional activity. By the end of the code period, such allowances were quoted by 25 companies. The same general situation prevailed in the development of new terms of payment and delivery. The producers in this group apparently used these miscellaneous terms of sale as a reservoir of competitive practices which alternative to their customary practices, and which could be used for price reduction when they felt it desirable.

Rearrangement of catalog numbers and of symbols for certain products also was used in this group as a device for evasion of filed prices.

The net effect of conditions in the industry was a reduction in the net prices of most items; however, there were also specific products which showed no change, or even increases, in prices. Most of the appliances falling in these latter two categories were "quality" items manufactured by well established, "old-line" firms whose prestige and extensive use of advertising appear to have been the principal factors maintaining the relatively higher price levels for these goods.

The maintenance of prices on these quality items was qualified, however, by the fact that the intense activity which occurred in the low-priced field seriously impaired the possibility of selling the higher-priced appliances. (***)

Most of the other companies (marketing the lower-priced appliances) attempted to preserve list prices and the regular classification discounts but while doing this quoted additional allowances which in the end had the effect of reducing net prices from 5 to 15 per cent.

The group voluntarily cancelled its price call before the Schechter decision.

(*) Code History of the Macaroni Manufacturing Industry, page 87.

(**) See Caesar, Albert - Domestic Electric Heating Appliances, preliminary paper, NRA price filing study of the Electrical Manufacturing Industry, page 16.

(***) Caesar, Albert, op. cit., page 13.

g. Agricultural Insecticide and Fungicide Industry

In the agricultural insecticide and fungicide industry, price filing was accompanied by changes which differed widely in two product groups. In the marketing of lead and calcium arsenate a price war developed, the severity of which led NRA to declare the existence of an emergency and to establish minimum prices for the two products. Complainants in the industry charged that the price cutting was initiated by the General Chemical Company in an effort to "kill off the little fellow", (*) and that all producers except the Pittsburgh Plate Glass Company joined in the war. There is some evidence that price filing gave some of the smaller companies more definite information about the price movements of their larger competitors than had been available before. The information apparently accelerated the price cutting by allowing these small concerns to follow more closely the price changes made by the General Chemical Company.

An examination of the prices of lead and calcium arsenates for the period 1925-35 shows the following:

(1) The price trends for both of these products, especially that for lead arsenate, had been gradually downward from 1925 to 1931, the decline during this period amounting to about 1½ cents per pound for lead arsenate from the 1926 average of approximately 14 cents.

(2) In 1931 a very sharp break in price occurred, carrying the level down to about 10 cents a pound for lead arsenate.

(3) From this point the trend continued downward until the lowest pre-code price, 9 cents a pound, was reached during the first quarter of 1933.

(4) The code was anticipated and the price of lead arsenate continued its rise until a price of approximately 9-3/4 cents a pound was reached shortly after the code became effective. This level was maintained until the beginning of 1934 when the price increased to more than 10 cents a pound.

(5) Later during the first half of 1934 the price dropped to about 8-3/4 cents, recovered slightly and then plunged to about the 7 cent level where it continued until an emergency was declared on November 9, 1934. (**)

(*) Telegram to Hugh S. Johnson and Charles H. Herty (Deputy Administrator) from Brechs and the Pacific Fruit and Produce Company, respectively, dated April 6, 1934.

(**) This was Order No. 275-A-11 which fixed the following prices per pound for a period of 90 days:

Lots:	Lead Arsenate:	Calcium Arsenate:
Multi-car lots	8¢	5¢
Car lots	8¼¢	5¼¢
Ten-case lots	8½¢	5½¢
Less than ten-case lots	9¢	6¢

No member was permitted to sell below these "lowest reasonable costs" except under specific exemptions granted by the code. The emergency was later extended 60 days from February 6, 1935.

(6) Under the emergency order the price of lead arsenate recovered from 7 cents per pound in September, 1934 to 9¼ cents in November, 1934 and this level seems to have been maintained for the remainder of the code period.

The price of calcium arsenate, which is somewhat lower-priced than lead arsenate, followed the same general course with only minor variations at its own lower level. (*)

The series referred to are wholesale prices secured from the Oil, Paint, and Drug Reporter (for Lead Arsenate) and the Bureau of Labor Statistics (for Calcium Arsenate) but appear to reflect the major trends in a fairly accurate manner in these instances.

Other products of the industry were not involved in the price war. The change in their prices seems to have been the elimination of special price concessions to certain buyers. According to the president of the Agricultural Insecticide and Fungicide Association, (**) "price uniformity between competitors has always been a characteristic of this industry due to the standardized nature of the products, so no change was noted (under the code)". The uniformity referred to (evidently in list prices and customer classifications) was apparently reduced by special price concessions, for the letter adds that before the code "some buyers have been paying a premium and others have been securing an extremely low price because of lack of open price information". As a result of the code, the letter asserts," variation of prices between different classes of customers was not affected, but was stabilized, in that buyers performing the same service or buying the same quantity were placed on a more equal basis."

Variation of price between geographical areas was evident on some products. The letter continues. "On some items, prices applied nationally and on others, only for local areas."

Cash discounts were reduced under the code by a code provision establishing a standard discount of one per cent for payment after May 1. The previously prevailing practice had been to grant discounts on a sliding scale, as follows:

Cash on May 1	5 per cent discount
Cash on June 1	4 " " "
Cash on July 1	3 " " "
Cash on August 1	2 " " "
Cash on September 1	1 " " "

An early effort to extend the price filing system to cover distributors' prices was soon abandoned. "Under the original provisions of the code, distributors were required to file prices; this was, however, not practical and was eliminated from the Code ..... Industry members were not held responsible for distributors adhering to members' filed prices". (***)

(*) For a detailed account and chart giving a more complete history of these price movements of Lead and Calcium Arsenates, see Nelson, Saul, Minimum Price Regulation Under Codes of Fair Competition, Report, Trade Practice Studies Sectio Division of Review, NRA, 1936, Chapter VII and Chart II.

(**) Letter from L. S. Hitchner, President, Agricultural Insecticide and Fungici Association, to Constant Southworth, Minimum Price Unit, Trade Practice Studies Section, January 23, 1936, NRA files.

(***) Ibid.

h. Builders' Supplies

Members of the builders' supplies industry complained of the effects of price filing upon the price structure of the industry. Price wars, especially in the St. Louis area, were attributed to the elimination of a system of mandatory mark-ups which had been included in the original code and to the substitution of an open price system which, it was alleged, fostered price cutting.(*)

Some dealers also feared that price filing would inform small customers of the high prices they were paying, relative to other customers, on various products, such as swinging doors and jute, and that in consequence prices to all customers would be forced down to the level of the most favored.(**) There is no evidence as to the accuracy of these fears.

Certain dealers also complained that failure to divide the United States into suitable price filing districts permitted some of the large concerns to sell in "outside" localities at the same price which they had filed for home trade upon which they incurred less cost; and that such sales constituted dumping and tended to break down the stability of prices in the areas where they took place.

6. An Industry for Which it is Difficult to Determine the Price Level

a. Electric Arc Welding Apparatus

In certain industries it is practically impossible to determine just what the price level or its trend was during a given period. The electric arc welding apparatus group of the electrical manufacturing industry illustrates some of the difficulties sometimes experienced in ascertaining the trend of actual prices in a modern industry.

In the first place the product of the industry is an engineered one and many forms of extra equipment and special attachments are frequently specified and added to the "regular" apparatus. There are also many special uses which require highly specialized units.

Manufacturers are also frequently confronted with the necessity of "making" or finding a new market for their products. This arises from the fact that welding apparatus is not usually sold in anticipation of possible future use but rather to fill existing needs or as an experiment in new construction methods, etc.(***) The commercial application

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(*) Letter from C. S. Long, administration member, to Frank A. Hect, deputy administrator, December 10,1934,(NRA files), also Builders Supplies Code History, October 7, 1935. pp. 82-84.

(**) Builders' Supplies Code History, Oct. 7, 1935, pp. 46-47.

(***) See Caesar, Albert, Electric Arc Welding Apparatus, preliminary paper, NRA Price Filing Studies of the Electrical Manufacturing Industry, 1936, pages 1-3.

of electric arc welding is comparatively recent, having developed largely during the past ten years, and overcoming the resistance to changing methods is one of the major sales problems in the industry. As one means of meeting this sales resistance the Industry has developed plans for instructing or training employees of customers, demonstrations and trials, rental purchases, and deferred payment plans in order to encourage new users and force sales. It is safe to say that in many cases the deals constitute sales of one or several of these plans rather than of the specific apparatus. The rapid development and almost constant changing of models has also created a "trade-in" problem some-what similar to that existing in the automobile industry.

Prior to NRA, the multiplicity and variation of these terms and conditions of sale made it very difficult to determine the actual market price in most instances. Sales were also at a low point, having declined from a peak of $11,500,000,.00 in 1929 to $4,500,000.00 in 1932.(*)

The main objective in issuing the original price call on October 19,1933, effective October 29, was to stabilize prices and to turn a spot light on the various elements of the industry's price structure, especially the demonstration, rental and payment plans.

The trend of prices is difficult of determination for several reasons:

(1) Although the list prices reported in 1933 were somewhat higher than those prevailing during the first half of 1935, members apparently did not adhere to these lists nor the other terms of sale very well. Thus, the apparent reductions made later may really reflect actual trading levels existing previously.

(2) The price call exempted prices to resellers and for export trade.

(3) The industry did not require "trade-in" terms to be filed.

(4) In November, 1934, it was found necessary to "reissue the price call emphasizing the necessity of including all types of equipment with adequate descriptive and technical information for identification." (**)

(5) Apparently due to the rather exceptionally wide margin for operation, companies were not very sensitive to price changes by competitors and therefore changes did not occur at the same time for all companies.

(6) There apparently were buying lulls in the industry. under such conditions changes in the price structure were often more-or-less nominal and perhaps went unheeded, at least for the time being, by most or all other companies.

(*) Ibid, page 3.
(**) Ibid, page 4.

It is possible, however, to state that the trend of rental and deferred purchase plans, the things which the industry seemed most concerned about in instituting the open-price plan, was such as to make it easier to purchase and that the financing costs were lower in early 1935 and those shown by the original filing under NRA. (*)

7. Intra-Industry Price Levels

The three preceding sections have dealt primarily with examples of industry price levels which appeared to show definite trends in their entirety and to all customers alike, more or less; however, it should probably be emphasized, at this point, that the more typical industrial situation involves a large number of company price levels to different classes of buyers for different quantities taken at different geographical locations, et cetera, and that it is these clusters of many different levels which constitute the industry price level rather than a single, unanimous price.

Futhermore, it often happens that shifts in these intra-industry price levels are more important to a given individual customer or class of customers than changes in the industry level as a whole. And this type of change may seriously affect certain customers when no material change is apparent in the industry price level considered as an average.

Chart II illustrates the structure of the dry battery industry's price level for large mono cells as shown by the original and final filings under the NRA code.

It is apparent from this chart that the average level for the industry meant little to any one class of customers and still less to any given customer dealing with a certain manufacturer.

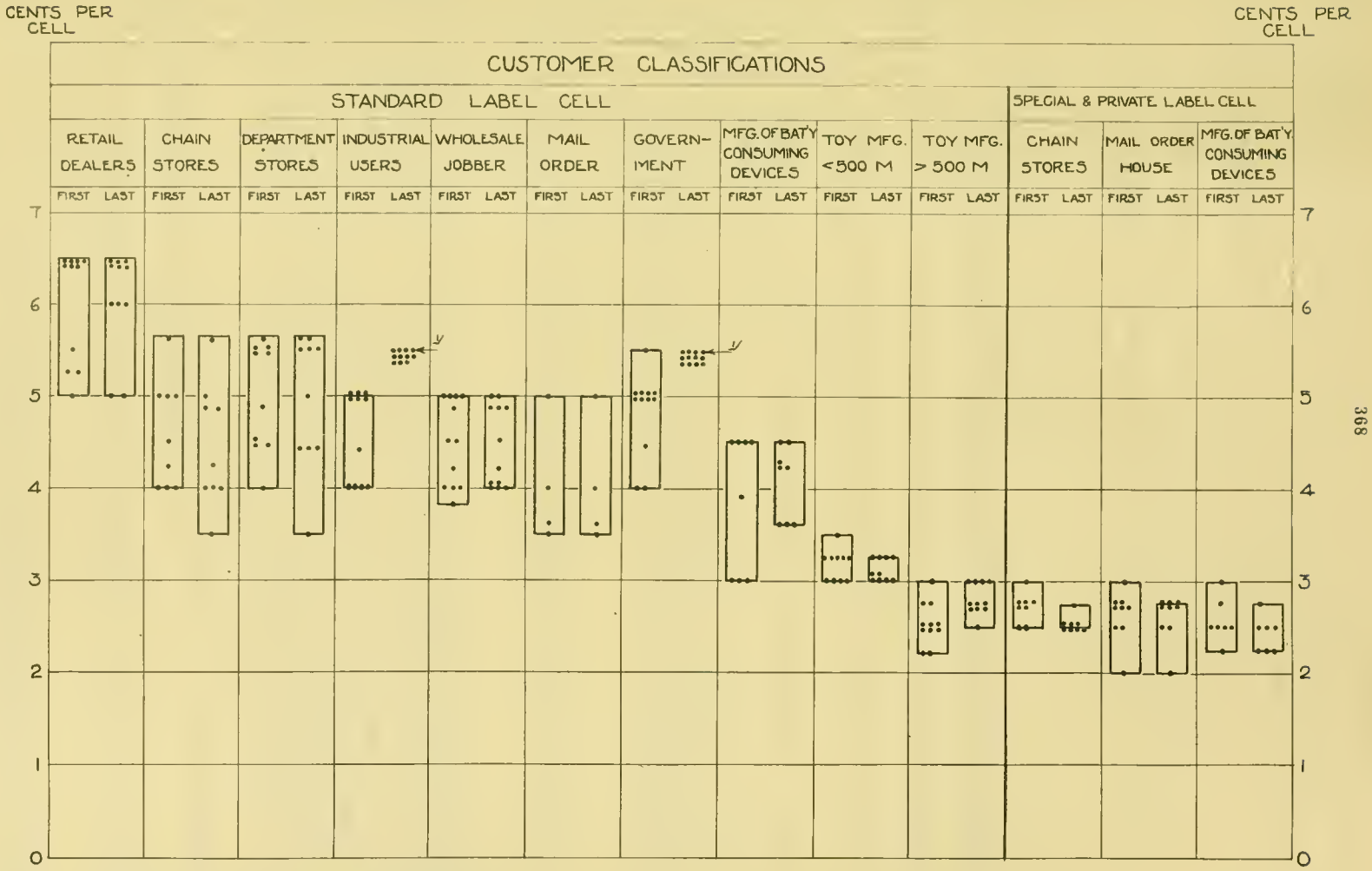
It is also clear that changes occurred in the levels of prices offered to certain customers which were greater than, less than, or just the reverse of those which took place in the levels available to other buyers or in the "average" of all the prices offered to all customers.

For example, the buying opportunities of "Industrial Users" or "Government" purchasers under the original and final filings not only offer an interesting comparison but this shift in treatment becomes even more interesting when contrasted with that affecting "Chain Stores" and "Manufacturers of Battery Consuming Devices." Considered as customer classes, the former two groups have experienced a pronounced increase in the price level at which they can purchase while the latter two have been favored by an increase in the number of low prices at which they can buy. As a third possibility, the "Mail Order" customers have experienced no change. There still remains, however, a rather wide range of choice among the prices offered to a given customer; this choice appears to range all the way from no alternative price at all to one of more than 2 cents.

One of the most interesting examples of such internal changes in relative prices occuring under an open-price code is supplied by the

(*) Ibid, page 7.

CHANGES IN TREATMENT OF CUSTOMER CLASSES
LARGE MONO CELL – DRY BATTERY DIVISION



SOURCE: COMPILED FROM DATA MADE AVAILABLE BY THE NATIONAL ELECTRICAL MANUFACTURERS' ASSOCIATION

NOTE – THE DOTS IN EACH BAR SHOW THE NUMBER OF COMPANIES QUOTING PRICES AS INDICATED ON THE SCALE

1/ – ALL DOTS ARE AT PRICE LEVEL MARKED BY ARROWS

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rubber covered building wire group of the electrical manufacturing industry. The discussion here will therefore be limited to the subject of price levels.

In its original filing under the NRA code this group exhibited a price structure consisting of the following elements:

(1) List prices on various sizes and types of wire.

(2) A system of destination symbols ranging from 1 to 34 and covering some 500 listed destinations.

(3) A freight adder schedule.

(4) Each company's Sales Policy Bulletin indicating discounts and its method of doing business with various customers.

Under this system the price was determined in the following manner.

(1) The list price of the particular type and size of wire involved was noted.

(2) The Sales Policy Bulletin showed the discounts, if any, which applied.

(3) After applying the proper discount, reference to the Destination Symbol Bulletin supplied the symbol applying to the quantity (carload or L.C.L.) and destination of the particular order.

(4) This symbol, when checked against the Freight Adder Bulletin, also indicated the freight adder per thousand feet.

This process resulted in a delivered price which was different for each destination symbol, inasmuch as the Freight Adder Bulletin was so arranged as to provide the low symbols with low freight adders and vice versa. Industrial areas and localities where much electrical power was used were given the lowest destination symbols (1 to 10) which meant that they also were charged the lowest prices. (*) Furthermore, no further allowance was made for the quantity purchased by wholesalers, but a possible 5 per cent discount for large purchases by others.

After operating under NRA for about nine months, the group changed its price structure to the following:

(1) A master list price more than double that of the original filing.

(2) Four quantity secondary list prices based on the value of the order or contract. These ranged from about 10 per cent lower than the original list to about 20 per cent higher.

(*) See Caesar, Albert, The Rubber Covered Building Wire Group, preliminary paper, N.R.A. Price Filing Studies of the Electrical Manufacturing Industry, 1936, pp. 1-2

The four quantity groups were:

(a) Less than $50.00 list.

(b) $50.00 to $199.99 list.

(c) $200.00 to $4,999.00 list.

(d) $5000 list and over.

(3) Complete revision of the Discount Bulletin so as to provide for discounts under three groups:

First Group: shipments to wholesalers' warehouse stock rated the following discounts shown in the columns applicable to the quantity specified in each individual order:

Column A - Discount, 15 per cent

Column B - Discount, 15 per cent

Column C - Discount, 10 per cent

Column D - Discount, 5 per cent

Second Group: shipments direct to customers of wholesalers, priced in the column applicable to the quantity specified in each individual order, rates a discount of 5 per cent.

Third Group: (a) Shipments of $200.00 list and over direct to the customers of wholesalers and applying to special building job contracts rated a discount shown in the column applicable to the quantity specified in the contract.

(b) On the same type of shipment amounting to less than $200.00 list, the discount applicable to the quantity specified in each individual order less 5 per cent was allowed.

Determination of the price under this revised system involved the following procedure:

(1) Examination of the master list price in order to learn the general list price of the size and type of wire wanted.

(2) Multiplication of the quantity desired by this list price.

(3) Inspection of Columns A, B, C and D in order to find in which of these columns the above product placed the order. This gave the Secondary List Price for the order.

(4) Given the secondary list price, the discount sheet indicated the discount, if any.

(5) Application of the discount gave an F.O.B. price per 1000 feet any and all destinations.

While some further modifications were made in this revised structure, these did not change the basic plan just outlined and will be omitted here for the sake of brevity and simplicity. The point of this rather radical shift is that it changed the net price from one which varied with each destination symbol to one which applied in the same way to any and all destinations.

This basic change definitely affected the level of prices in the industry as is shown in Chart III. Under the original plan, the geographical areas which constituted some 75 to 80 per cent of the entire market received considerably lower prices than those representing the remaining 20 or 25 per cent. Under the final plan, all areas received the same price. This change, then, constituted not only definite changes in the relative treatment of different customers, but an influence toward an increase in the composite price level of the industry when both the volume and the price at which that volume sold are taken into consideration. However, the fact that wholesale and quantity discounts were increased tended to reduce the composite price level.

The "industry price level" in such cases can only be approximated by an average of all of the single transactions weighted by their volume. Such volume data are, however, not available.

This suggests another factor which may mislead the unwary statistician who attempts to measure the probable incidence of an industry's price changes by means of an "average price" for the industry--the practice of charging "what the traffic will bear" for the time being. A good example of this practice was pointed out in a report received by the former Consumers' Advisory Board, NRA, under date of December 5, 1933, and reading asfollows:

> "Most of the commonly used items all along the line in paper supplies are up 70 to 100 per cent. I was talking today to a printer, who advised me of that fact. He stated that when the time came for an investigation, the paper people would be able to show that there had been only about a 10 or 20 per cent increase in their price list.
>
> "Many of their 'dead' items haven't been increased at all in price, but in his line anything commonly used is way up and the same in supplies to bakers. A check-up on the paper items most commonly sold will show heavy increases, while their price book average will show only a nominal increase." (*)

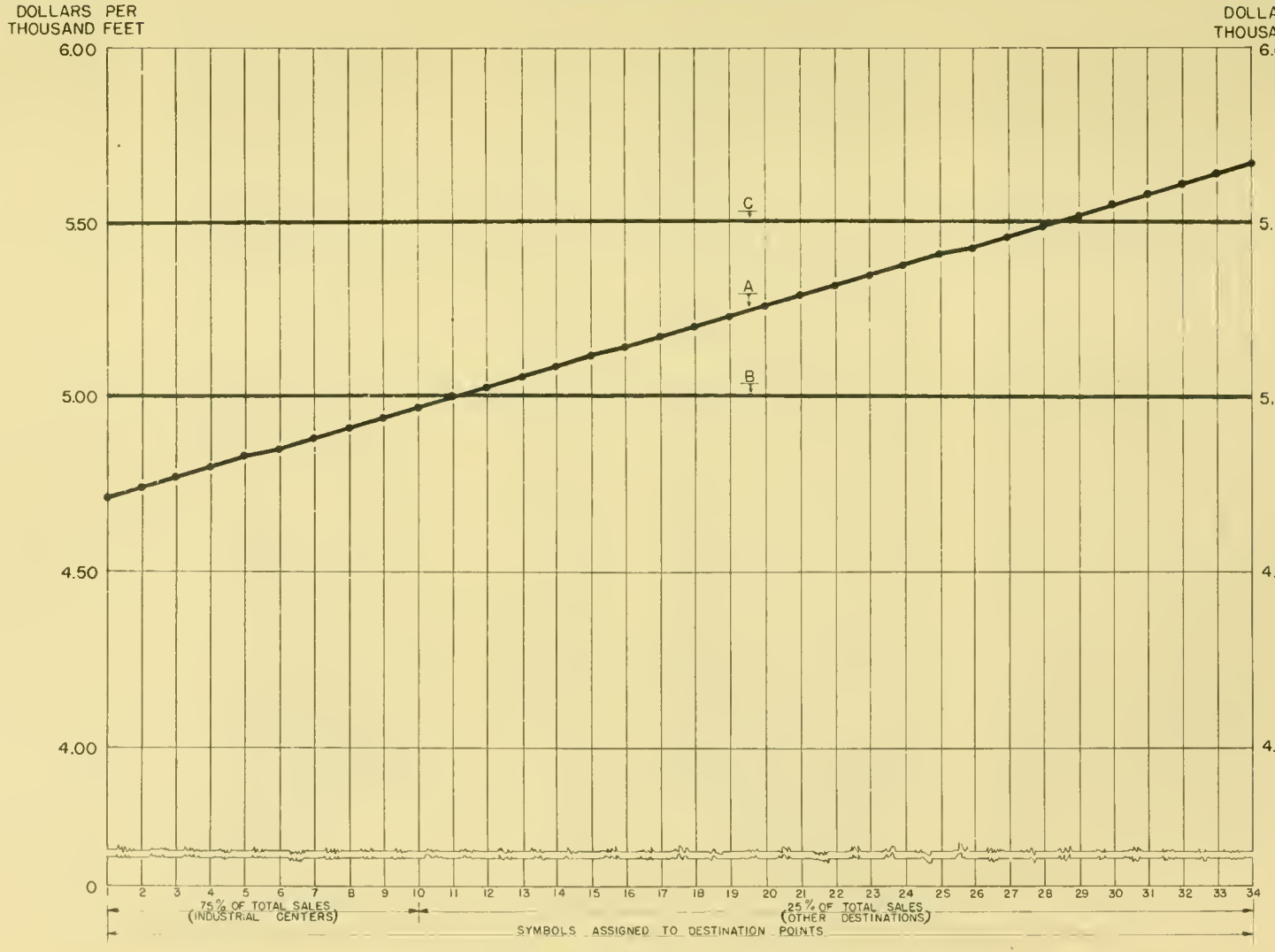
A statistical check showed an increase of 16 per cent in the paper and pulp price index while a large number of consumer complaints stated that much greater increases had taken place in a number of specific paper items. (**)

(*) Baird, Enid, Consumers' Advisory Board Report prepared for the Hearing on Price Changes, January 9 and 10, 1934, page 2, NRA files.

(**) Ibid., pages 2; 4-6, inclusive.

EFFECTS OF CHANGING THE GEOGRAPHICAL PRICE STRUCTURE ON RUBBER COVERED BUILDING WIRE PRICES

(MOST FAVORABLE PRICES)



A - SCALE OF PRICES TO 34 CLASSES OF DESTINATION WITH THE BEGINNING OF PRICE FILING
B - UNIFORM PRICE FOR ALL DESTINATION POINTS AS ESTABLISHED AFTER 9 MONTHS OF CODE OPERATION
C - UNIFORM PRICE FOR ALL DESTINATION POINTS AT THE END OF CODE OPERATION

SOURCE: DATA MADE AVAILABLE BY THE NATIONAL ELECTRICAL

NRA
DIVISION OF REVIEW

D. The Relative Treatment of Customers Under Price Filing

The degree of spread in prices to various customers is of peculiar interest under price filing, because the argument for price filing systems so often rests, in part at least, upon a belief that price filing will prevent or reduce discrimination among customers. As has been indicated in Chapter II, there are inherent difficulties in deciding what spread in prices among customer classes would be non-discriminatory. It is not important here to attack the question of discrimination. Frequently, however, the belief has been that prices to various customers would become more uniform in price filing, whether or not this increase in uniformity represented a decrease in discrimination. It is therefore worthwhile to examine the available material, in order to see how far such uniformities have developed.

In the cases presented in the previous section, it appears that price filing was not accompanied consistently either by narrowing or by widening of the spread in prices among classes of customers. In the case of rubber covered building wire, the price structure developed during the filing period eliminated the price advantage which had been enjoyed by the industry's principal markets and established a uniformity in the treatment of groups in various markets. The price structure of radio tubes, on the contrary, developed preferential treatment for jobbers such as had not been characteristic of the industry at the beginning.

Further evidence of this divergent development may be presented.

1. Cases in Which the Trend Was Toward More Uniform Treatment of Customers

a. Electric Fans

The general price structure of the electric fan group originally was based on a combination of customer classifications and quantity discounts, the elements of which were fairly uniform as between competitors. During the code period the industry practically eliminated quantity discounts except to one customer classification, resale machinery manufacturers. Table XI, following, shows that in the final filing, excepting the one classification, all but one company had uniformly gone over to the new basis.

TABLE XI

NUMBER OF COMPANIES IN THE ELECTRIC FAN INDUSTRY

OFFERING SPECIFIED QUANTITY DISCOUNT SCHEDULES TO SPECIFIED CUSTOMER CLASSES

Customer Classes	Original Quantity Discount Schedules Filed								Final Quantity Discount Schedules Filed					
	Schedule A.		Schedule B.		Schedule C.		Schedule D.		Schedule A		Schedule B		Schedule C	
	# of Fans	% Discount	# of Fans	% Discount	$ Volume	% Discount	Volume	% Discount	# of Fans	% Discount	# of Fans	% Discount	$ Volume	% Discount
	1-24	15	1-49	25	1-49	35	$1-$49	35	1-99	35 & 5	500-	50	1-49	35
	25-49	25	50--	35 & 5	50---	35 & 5	$50-35&5 a/		100--40,10, & 3				50--	35 & 5
	50---	35 & 5					Over 99 fans 40,10, & 3							
1. Chains	f/													
2. Consumer	8		1											
3. Consignment					2									
4. Dealer					3								1 d/	
5. Dept. Stores					4 b/						1 c/		1 d/	
6. Distributor					1									
7. Government														
8. Hotels	4		1											
9. Institutions														
10. Jobbers														
11. Public Utilities					4 b/						1 c/		1 d/	
12. Resale Machinery Mfgrs.							3		5					
13. Wholesalers														
Total	12		2		19		3		5		2 c/		3 d/	

a/ One company gave 35 and 10 per cent.
b/ Eight-inch fans only.
c/ All filed by the same company
d/ All filed by the same company.
e/ There were 12 companies in the group studied.
f/ For certain customer classes, no quantity discounts were filed.

Source: Work Sheets for the Electric Fan Group, NRA Price Filing Study of the Electrical Manufacturing Industry.

2. Cases in which the Trend was Toward a Wider Spread in Prices To Different Customers

a. Fractional Horse Power Motors

This group affords an interesting illustration of the development of wider spread inquantity discounts accompanied by more general eligibility for such discounts. The stated purpose in this group's adoption of price filing was "to do something about quantity discounts."(*) Apparently the group considered their old quantity discount system to be irrational and desired to place it on a "more reasonable" basis.

The fractional horse power motor group, during the code period, could be roughly divided into two groups - "standard" and "non-standard" - each having its own price structure. The two groups could befurther divided into three on the basis of their markets. The first was concerned almost entirely with several volume purchasers; the second also went in for volume but also accepted other sales; the third sold chiefly to low-volume customers but looked upon competitors with large-volume buyers with considerable envy. (**)

The original pricing system of the fractional horse power motor group, as revealed by the first price filing under the code, has been referred to previously as an example of a complicated price structure. It will be sufficient for present purposes to notice that this structure involved, among other elements, customer classes which carry standard classification discounts. In addition, many companies under each of the principal customer classifications, were given "multipliers" which in effect accorded each of these companies a specific and more favorable discount than they enjoyed on the general class.

There appears to be no distinct dividing lines between the "standard and "non-standard" price structures, the divergence of particular members from the standard being a matter of individual degree. In general, the companies with non-standard structures appear to have offered greater discounts than the standard companies, especially than those customer classes least favored by the standard group.

(*) Caesar, Albert, the Fractional Horse Power Motor Group, preliminary paper, NRA Price Filing Studies of the Electrical Manufacturing Industry, February 1936, page 19.

(**) Op. cit., supra.

The really significant change in this price structure of the fractional horse power motor group during the code period was an increase in quantity discounts. For the sake of brevity, the changes with respect to only one customer classification, the most important Classification G - will be examined here.

This class carried a standard classification discount of 20 per cent and a multiplier system which offered discounts from 21 per cent to 25 per cent. Customers in this class also had available a discount based on dollar value of orders and shipping requirements as well as a further discount on specific ratings of fractional horse power motors. This last, however, applied only to about one-third of the listed Class G purchasers. The possible range of discounts for Class G,then, ranged from 20 per cent (its standard class rate) to 47.11 per cent in the original price structure. Under the circumstances, however, it was possible for only four companies in Class G to receive the maximum discount and then only in case they ordered for shipments in quantities valued at $10,000.00 or more. (*)

According to the final price structure under the code, the regular customer classification discounts for Class G remained the same; however, a Class G purchaser might now receive discounts based on the dollar value of order and shipping requirements ranging from 20 per cent to 42 per cent. The special discount quoted certain Class G customers on purchases of motors of specific rating remained the same.

A comparison of the total possible discounts to Class G customers under the original and final standard price structures (excluding the special discount on purchases of motors of specific rating which remained the same) shows that the former structure offered the customer a maximum of 38.5 per cent while the latter provided one of 56.5 per cent.

The principal cause of this change in total discount was the maximum discount available on the basis of dollar value and shipping requirements, which was increased from 18 per cent to 42 per cent, or 133-1/3 per cent.

The original price structure required that the class G customer, in order to receive the highest discount based on dollar value of order and shipping requirement, must order in lots valued at $10,000.00 or more, unit shipment amounting to $10,000.00 or more.

(*) In the average filing, only about 12 companies received the highest Class G "multipliers." Only 7 companies received the highest possible discount on purchases of specific ratings of fractional horse-power motors. Only 4 of this 7 received the highest "multiplier"

The final structure changed this requirement to orders in lots valued at $16,000.00 or more, unit shipment amounting to $150 and complete order in 90 days. Thus the change in the price structure not only increased the premiums on quantity order but also made them more easily available.

In the final price structure as compared with the original file under the code, the situation as to uniformity between discounts offered by the "standard" and "non-standard" groups was much the same. Practically the same companies continue to diverge from the standard structure. The only change, and this was not of great importance, was that the non-standard group now included, in addition to its former members, a few additional companies which had maintained a part of the original price structure, and had added parts of the final system.

b. Electric Arc Welding Apparatus

The peculiarity of this industry's treatment of customers was the development of special discounts upon government business. With respect to the use of customer classifications in this group, government business - especially that of the Navy Department - offered the best sales opportunities during the first part of the code period. Company No. 6 of the group, in its original filing, had quoted government schedules on purchaser's specifications at prices equal to standard equipment of equivalent rating. This company's prices on standard equipment were also lower than those of other companies supplying comparable items.

In order to offset this competitive advantage possessed by Company No. 6 and, at the same time, maintain their level of prices on standard items, the other companies of the group resorted to the creation of two customer classifications, enabling them to quote different prices to the government and to others. This plan allowed them to compete with Company No. 6 in the market which was the most important at that particular time, without disturbing the main price structure and alarming the trade generally.

C. Degree of Price Uniformity Under Price Filing

As had been pointed out in Chapter II, the price structures of various producers in an industry may contain uniformities of many different kinds. There may be uniformity in classification of customers, in terms and conditions of sale, in list prices, and in net prices to some or all customer classes. These uniformities may appear separately as uniform elements in divergent and various price structures, or together as constituent parts of a uniform price structure for an entire industry.

An adequate analysis of price uniformities should examine a considerable range of industries, in order to determine what elements of the price structure were most usually uniform at the beginning and at the end of the price filing period, to consider how far these uniformities are traceable to particular aspects either of price filing plans or of characteristics of the industries concerned, and to appraise the entire structure of prices and terms of sale in an effort to determine whether or not, on the whole, it permitted flexible movement of prices.

It has not been possible to carry the present study so far. The material presented in this chapter illustrates the development of various kinds of uniformity, and also the failure to develop certain uniformities which evidently were desired by the members of certain industries. The diversity of the cases may be taken as evidence that price filing as such has no single necessary effect in creating price uniformity; and that careful examination of particular industries and the bearing of particular price filing plans upon them is prerequisite to a judgment of the probable influence of price filing upon an industry's price structure.

Certain materials concerning uniformity under price filing plans have been presented earlier in this chapter in discussions of price movements and the relative treatment of different customers.

1. Cases of Failure to Achieve Uniformity.

The various cases in which price wars developed, or in which the terms and conditions of sale were used as means of evading the price filing plan to such an extent that price filing itself broke down and was abandoned, are evidence of failure to achieve uniformities which were generally desired by members of the industries in question. Terms and conditions of sale appear to have been frequent excuses for the evasion of filed prices in the domestic heating appliance industry, the macaroni industry, and the flexible cord industry. The industries in which prices declined under price filing have already been listed---flexible cord, radio receiving tubes, fractional horse power motors, macaroni, domestic heating appliances, builders' supplies, and certain products in the agricultural insecticide industry. Steel castings should not be included in the list for present purposes, because in this industry the prices of various products moved in opposite directions, and there is no evidence that the downward movements were of serious concern to members of the industry. Moreover, in some of these cases--the flexible cord industry, for example--downward price movements were apparently accompanied by uniformity of price at a given moment. In general, however, price reductions were made reluctantly, and met only when and insofar as other producers could not avoid it. Insofar as producers would maintain price differentials, they did so in declining markets.

Two further illustrations of conspicuous failure to achieve desired uniformities may be cited.

a. Candy Manufacturing.

In the candy manufacturing industry, customer classifications were a source of considerable trouble under price filing. The code authority attempted to hold all members of the industry to the same classifications and class definitions, but individual producers persisted in creating new classes. For example, certain members divided the class of jobbers, which received a 20% discount, into two groups, service jobbers and supply jobbers, and gave the former 20% and the latter 25% discount. This preferential treatment for "pet" accounts, when uncovered by price filing, led to a series of price reductions. In retail markets, the industry apparently sought to maintain prices by resale price maintenance without formal sanction, the resale price maintenance provision of its

proposed code not having been approved. At the time of the Schechter decision, the industry was said to be considering the advisability of discontinuance of its open price plan, as a further means of relief. (*)

b. Business Furniture

The most conspicuous aspect of price filing in the business furniture industry was the difficulty it created in the relation of dealers' prices and manufacturers' prices. About 60% of the industry's product was sold direct to the consumer, the other 40% through dealers, of whom there were about 4000 in 1933. Although divisional supplementary codes of several divisions of the industry included provisions for resale price maintenance, these branches of the industry alleged that the provisions were failing to prevent widespread price cutting by manufacturers through dealers, and desired stronger provisions which would forbid a manufacturer to sell to a dealer unless the latter agreed not to resell at prices lower than those filed by the manufacturer. (**) It was alleged that in the absence of this requirement, dealers, not being forced to file prices, sold below the prices filed by manufacturers for sale to consumers, and thereby diverted sales.

The code helped to save the dealer set-up, according to the secretary of the national executive committee of the trade association. There is also fragmentary indication that when the open price system was stayed in the filing supply division of the industry, some of the dealers and "little fellows" were eliminated." (***)

2. Cases in Which Some Uniformity Was Achieved

Among the cases already mentioned in which a significant uniformity of prices or terms of sale was achieved are; the rubber covered building wire industry, in which a systematic new price structure was intriduced throughout the market; the laminated phenolic products group, in which the lone recalcitrant member was brought into line with the rest of the industry during the filing period; and the radio receiving tube group, in which consignment selling was eliminated under price filing.

Other cases in which some degree of uniformity was achieved are set forth below. Some of these cases illustrate both the achievement of uniformity in certain parts of the price structure and failure to achieve it in other parts.

a. Fertilizer Industry

In the fertilizer industry, changes in terms of sale were frequent in the early half of the code period. During the latter part of the period, certain pricing practices apparently had reached a new and relatively stable basis and underwent relatively little further alteration.

(*) Interview with L.E. Kline, assistant deputy administrator. Code History of the Candy Manufacturing Industry; p. 79. Memorandum from C.W.Dunning, deputy administrator to Armin W. Riley, Division dministrator, March 5, 1935, NRA Files.

(**) Memorandum from L. J. Cochran, acting assistant deputy administrator to W. A. Harriman, January 22, 1935, NRA Files.

(***) Memorandum of a telephone conversation between R. B. Dryer, Cleveland, and L. J. Cochran, Washington, February 4, 1935; also a memorandum from L. J. Cochran to George Carlson, May 11, 1935. Also notes apparently made by the deputy administrator in connection with a meeting to discuss the effects of the code on the Filing Supple Division, NRA Files.

Conspicuous among these changes was development of the practice of quoting prices "delivered to the farm." Before the code most dealers had quoted "delivered to the dealer," while a few had used basing point systems of quotation.

The main purpose of this change, according to the fertilizer association, was to simplify and standardize quotations as an aid to the elimination of secret rebates and "retroactive settlements" made at the end of a season, often at the lowest price prevailing at any time during that period.

The Fertilizer Code (Article VII, Section 7) also permitted the producers in each zone to recommend trucking allowances for the approval of the NRA. There appears to be no record of any such recommendations or their approval by NRA. Nevertheless, two types of trucking allowances were in actual use during the code period.

The first type allowed a farmer or dealer who transported fertilizer from the railroad receiving point to the farm a deduction of 75 cents per ton from the announced price. This allowance remained unchanged during the period of operation under the code.

The second type, covering the trucking of fertilizer from the plant to the farm, was more important and underwent considerable change during the period of the code. The original filings under NRA provided for discounts equal to the actual rail or water freight rates from the producer's plant to the receiving point nearest the consumer's location. Presumably this was the arrangement which had been in effect prior to the code. About January 1, 1934, however, the fertilizer producers adopted trucking allowances considerably lower than the actual freight rates, as is shown in Table XII.

Table XII

Trucking Allowances and Actual Freight Rates for Zone 5 of the Fertilizer Industry

Highway Mileage	Trucking Allowance (per ton)	Approximate LCL Freight Rate per ton on Railway Mileage
1-15	$ .75	$1.30 - 1.45
15-25	1.00	1.45 - 1.65
25-35	1.25	1.65 - 1.80
35-50	1.50	1.80 - 2.15
50-75	1.75	2.15 - 2.60
75-100	2.00	2.60 - 2.95
100-125	2.25	2.95 - 3.30
125-150	2.50	3.30 - 3.60
150-175	2.75	3.60 - 3.95
175 and over	3.00	3.95 and over

Source: Whitney, Simon, Fertilizer Industry Price Study, December 15, 1937. p. 56.

The truckers claimed that these allowances were so low that dealers or consumers ordinarily could not afford to hire trucks. As a result the truckers appear to have lost much of this business to the railroads.

Farmers, so long as they were willing to consider only the cost of gasoline and oil, could use their own trucks. When they did this, the fertilizer producers secured a profit comparable to that which they would have received if they had shipped by rail. (*)

Another outstanding change was in cash discounts. Cash discounts are very high in the fertilizer industry and cash sales predominate; accordingly, the terms of payment constitute a rather important element in the price structure of this industry. A number of changes in cash di discounts were recorded during the code period, as shown in the following summary which has been adapted from the study of the fertilizer industry's experience with price filing:

> "At the beginning of the code the usual schedule of cash discounts in South Carolina was as follows:
>
> "10 per cent for cash.
> " 9 " " " payment within 30 days of invoice.
> " 8 " " " " " 60 " " "
>
> "(Note required, bearing interest at 8 per cent, if payment not made within 60 days of invoice.)
>
> "Royster differed in adding 5 per cent to all cash discounts taken by consumers if purchase was made in carload lots.(**) Afterward cash discounts were increased and put on a basis of named dates, instead of a given number of days after invoice. The schedule effective during the first six months of 1934 was:
>
> | | | |
> |---|---|---|
> | "Interest on deposits in advance of purchase: | | 8 per cent per annum. |
> | Payment before March 15 | : | 15 per cent. |
> | " " April 15 | : | 14 " " |
> | " " May 15 | : | 13 " " |
> | " " June 30 | : | 12 " " |
>
> "Additional discount if cash is paid at or before delivery, regardless of the month: 1 per cent (this discount being figured on the cash price.)
>
> "Note required if payment not made by June 30, to carry interest at 8 per cent per annum.

(*) See Whitney, Simon, Fertilizer Industry Price Study, December 15, 1935, pp. 55-57 for a more detailed treatment of this subject.

(**) The Royster Company was usually the price leader in the fertilizer industry.

"The following changes occurred later:

"1. On schedules issued in the summer the above dates were set forward six months.

"2. After June 30, 1934, the per annum interest rates were reduced from 8 per cent to 7 per cent.

"3. After September 29, 1934, nitrate of soda and sulphate of ammonia were allowed the top discount if payment was made at any time during the season.

"4. On November 2, 1934, the 1 per cent special discount was dropped, and the other discounts were reduced by 2 per cent - except that the one applicable to the final period before payment became due was reduced by 3 per cent (from 12 per cent to 9 per cent - this being simultaneous with the reduction in the tonnage of mixed goods and superphosphates required to obtain a quantity discount which offset the loss of the cash discount for buyers of certain quantities.)

"5. On November 19, 1934, the May 16-June 30 period was split, 9 per cent being allowed for payment in the last half of May and 7 per cent for payment in June.

"In summary, discounts were made more liberal after January 1, 1934 (most companies adding 5 percent to the former schedule); but were reduced somewhat (generally 2 per cent being deducted) after November 2, 1934." (*)

Most of these changes, was well as other changes in list prices or terms of sale, were led by the F. S. Royster Guano Company (one of the six large concerns). It led the way in all of the three actual price changes on finished products which were general throughout the industry. (**)

(*) Whitney, Simon, Fertilizer Industry Price Filing Study, December 15, 1935, pp. 47, 48-49, NRA Files.

(**) Whitney, Simon, op. cit., p. 14, NRA Files.

b. Valve & Fittings

The valve and fittings industry proposed a much more ambitious plan of price standardization than was approved in the code. The code as proposed provided (Section 5) that

> "The Institute shall formulate and establish (subject to the approval of the Administrator) indexes of general relation values of sizes and/or types and weights of various classes or kinds of products and when any such index has been so established each member who is a producer of such products (for which each such index has been established) shall publish and employ list prices reflecting the index value with the least practicable delay."

This proposal was not approved.

It is also known that the code authority of this industry considered a standard price filing form to be used by all members in filing prices. This was never accorded administration approval; however, the Consumers' Advisory Board believed that considerable evidence existed that it was used without approval and that uniform prices and substantially higher price levels had resulted from its use and from other code authority activities. (*)

After the code was approved, the largest producer (The Crane Company) apparently served as the price leader in attempts to secure price uniformity by standardizing the various elements of the price structure. The code authority also appointed a large number of committees which studied the different problems and sought to set up the standards or plans of procedure. Some of those committees were as follows: a freight allowance committee to set up "equitable" freight allowances; an automatic sprinkler committee to clear up the confusion "regarding the classification as a trade factor of the different types of sprinkler contractors"; an export committee to develop greater uniformity in the prices of members of the industry to foreign buyers and to see that members received more uniform and complete information relative to export opportunities; a market study committee to analyze recommendations regarding the gradation of factory-shipment price rates for the various trade factors; a committee on the distribution of products to set up a uniform plan of distribution which would be satisfactory to the entire industry; later a producer-distributor relationship committee to develop a uniform plan for contractual relationships with distributors - i.e., to establish uniform rules and regulations governing the sale of products in the "secondary" market (that served by the distributors).

Apparently the Crane Company took the lead in putting any new arrangements into effect after the plans were worked out by the Committee.

(*) See the Code History, Valve and Fittings Industry, for a more detailed account of these standardizing activities.

Among the terms standardized were terms of payment. The code provided for the standardization of these terms, and the standard became 2 per cent on the 10th or 25th of the month or net 30 days. An extra 30 days was allowed on interzone transactions. To purchasers whose requirements necessitated frequent billings, the cash discount could be made deductible from a remittance covering all charges as of the first or second half-month period. Invoices were supposed to bear the date on which delivery was made to the carrier at the point of shipment. All through the code period a number of members considered these terms unsatisfactory and continued to agitate for a return to those most generally employed previous to the Code--"not in excess of 60 days from time of shipment and subject to 2 per cent cash discount on or before the 10th of the month following shipment (except for interzone shipments)". The pre-code plan was proposed as an amendment but was never approved or formally adopted; however, violations of the use of the shorter period prescribed by the code seem to have been frequent enough to justify the statement that the industry failed in its attempt to standardize this particular element of its price structure.

Carefully defined customer classifications were also put into effect. However, difficulties arose in the relation of various groups of distributors.

Two of the largest members of the valves and fittings industry seem to have tried to adhere to definite marketing policies and to protect the margins involved in the distribution of goods. One of these made a policy of selling through its own outlets; the other professed to sell only through jobbers. Jobbers apparently handled about 50 per cent of all products marketed by the industry. The two large producers apparently tried to persuade the others to adhere to the same or similar marketing arrangements; however, certain firms--such as Stanley G. Flagg & Company--refused to do this in all cases and frequently sold direct to large consumers without taking into consideration the ordinary jobber's margin. The general marketing situation led to considerable dissatisfaction among the members of this industry and a producer distributor relationship committee was set up to develop a contractual plan for dealing with distributors. This plan was supposed to establish uniform rules and regulations governing the sale of valves and fittings in the "secondary" market. Such a plan was worked out but never became officially operative. (*)

The ambitious program of the valve and fittings industry was also handicapped by the following conditions:

(1) The industry is complex. It purchases both ferrous and non-ferrous metals and manufactures them into a great variety of products which are sold to wholesalers, contractors, equipment manufacturers, and directly to consumers for use in the construction of buildings, water-works, railroad equipment, ships, oil refineries, et cetera.

(2) There is no uniform method of marketing, but rather a set of intertwining routes from the producer to the consumer.

(*) See the Code History of the Valves and Fittings Industry.

(3) Some forty-four members (of a total of about 200) offer fairly complete lines, while most of the remainder are monoline producers, or manufacturers of special valves or of less than full lines.

(4) The institute membership was, numerically, a small proportion of all members and represented only about 75% of the producers of general service designs and of the capital invested in the industry.

(5) While some of the products are fairly well standardized, others are made to specification. The Crane Company, largest producer, makes about 36,000 different items.

(6) Some of the large members sold through their own outlets (including branches and warehouses) while others used distributors. Certain other firms sold direct to consumers.

(7) Many members were dissatisfied with the shorter terms of payment adopted through the code. This let to quite a few violations.

(8) There was much overlapping with other similar industries, such as the waterpower equipment subdivision of the machinery and allied products industry, and the steel castings, scientific apparatus, steam and fluid specialty, and pipe nipple industries.

(9) Some of the producers in New York and Philadelphia delivered in small quantities by truck to customers and made no charge for freight, These producers also filed prices providing for freight allowances under certain minimum quantities which had been prescribed by the industry.

(10) Some of the large producers with branches or warehouses sold through these outlets without filing the prices involved in such sales.

(11) The NRA also refused to approve a number of the plans worked out by the code authority's committees.

Needless to state, under these conditions, the industry failed to carry out many parts of its elaborate program of price standardization.

c. Electric Arc Welding Apparatus.

The code experience of this group shows certain changes with respect to uniformity of merchandising methods employed which accompanied the open price filing, and also the use of customer classifications to meet a special competitive condition.

The price structure of the group at the inception of the open price system under the NRA showed little or no uniformity as among group members. Fourteen companies employed rental or rental purchase plans. Of these, 8 used one plan, 3 another, and the remaining 3 still another. Eleven members had deferred payment plans, and only 3 of them employed the same plan. Most of the other elements of the price structure presented a similar picture, except "accessories" which had been standardized to some extent through the pre-code activities of the trade association.

The final structure under the code showed an entirely different situation. Seventeen companies now offered deferred payment plans and 14 were using the same plan. In making rentals, 15 of the members used the same scheme. A similar degree of uniformity applied to the other elements of the price structure in the final filing. (*)

d. Pole Line Hardware Group - Electrical Manufacturing Industry.

Uniform changes in the terms of payment constituted a principal shift in the price structure of this group. Table XIII below, shows the changes which took place in the terms of payment for this group in the course of price filing. As indicated in the table, this group divided the United States into three areas. The Eastern Division comprises all of the country except the Western Division (California, Oregon and Washington, and parts of Idaho, Montana and Nevada), and the state of Arizona, which constituted a third area. Although price terms and other conditions varied as between the three geographical areas, they were the same for all competing companies in any one area at any given time. Prices were always highest in the Arizona area and lowest in the Eastern area; approximately equivalent differentials existed for all items between the three areas.

(*) See Caesar, Albert "Electric Arc Welding Apparatus" preliminary paper, NRA Price Filing Study of the Electrical Manufacturing Industry, 1936, for a detailed account of this Group's experience with price filing under the NRA Code.

TABLE XIII

TERMS OF PAYMENT FILED BY MEMBERS OF THE POLE LINE GROUP OF THE ELECTRICAL MANUFACTURING INDUSTRY

(Major Fillings)

Filing	Geographical Divisions		
	Eastern	Western	Arizona
1.	F.O.B. Pittsburgh or Chicago	F.O.B. California, Oregon or Washington	100 lbs. F.O.B. any R.R. platform; less than 100 lbs. F.O.B. Phoenix.
	30 days net	2%, 10 days; net 30 Distributors, 2%, 15; net, 30.	2%, 10 days; net, 30. Distributors, 2%, 15; net 30.
2.	2%, 10, net 30. Distributors, 2%, 15; Net. 30.	2%, 10th. prox.; net, 30 to all customers.	2%, 10th prox., Net. 30 to all customers.
3.	2%, 25th, 1st to 15th invoices; 10th prox., 16th to end of month invoices	No further change	No further change

Source: Chronological History of Filed Prices, NRA Price Filing Studies of the Electrical Manufacturing Industry.

e. Wholesale Confectionery

The operation of the open price provision in the wholesale confectionery industry was entangled in efforts to maintain prices by more direct means. In the autumn of 1934 twenty manufacturers sent letters identical in content, and in some cases in wording, to all their customers, demanding that retail prices be maintained 20 percent above manufacturers sales prices, with a 6% discount for cash and carry jobbers. The letters broadly intimated that wholesalers who did not observe these prices would be considered unsatisfactory customers and denied further goods. (*)

Other means were used by the wholesalers themselves to protect distributive margins: Among these were:

1. Boycott of manufacturers who sold to "illegitimate" jobbers.

2. Refused to sell to retailers who did not buy wholly from "legitimate" jobbers.

3. Efforts by trade association action to limit competition and restrict the action of jobbers not members of the association. (**)

Activities of this character led to a public hearing in Washington in January 1935, to consider "why the open price plan contained in Article VII of the code should not be stayed due to irregularities of enforcement and administration." A second hearing, held later in New York, resulted in the drafting of an order to remove from office an official to the code authority. The Schechter decision was rendered before final action was taken.

D. Summary of the Cases: The Character of Prices under Price Filing

The foregoing sections have demonstrated that the level or general direction of prices has varied greatly in different industries under open-price codes. In some the general direction of price has been upward and the final level higher than the original; in others, no significant change has occurred.

These industries appear to fall into three groups:

(1) Those with prices which were uniform, relatively stable and maintained at a high level.

(2) Those in which prices generally lacked uniformity, were relatively unstable and declined under NRA.

(3) Industries in which the results were somewhat mixed. That is, prices were rather uniform but unstable; or stable but not necessarily uniform; or fluctuated considerably but about a trend line which represented a rather high level; or were uniform at a low level.

(*) Code History of the Wholesale Confectioners Industry, pp. 25-28.
(**) Interview of L.L.Blair, member of Trade Practice Study Section, with H.K.Sorenson, State NRA Officer, Philadelphia. Sept. 26, 1935.

CHAPTER VI

NRA ADMINISTRATION OF OPEN PRICE PLANS

Introduction

The first section of this chapter is devoted to a consideration of the character and extent of NRA administrative supervision over code authority activities with respect to price filing, and to the nature and extent of the modifications of price-filing provisions effected in the course of administration. The second section considers the extent and efficacy of both Administration and code authority compliance activities with respect to these provisions. In the final section the official and semi-official policy declarations of the Administration as to price filing are set forth and discussed. (*)

A. Supervisory Administrative Action

Summary

Various causes combined to make necessary a great deal of supervision and correction by the Administration of code authority activities in connection with price filing. Imperfect drafting of the price filing provisions of the codes made possible wide differences of opinion as to the power intended to be reposed in the code authorities to interpret and govern price filing plans. In addition to this, certain of the code authorities considerably overstepped the clear and unequivocally stated limits of their power. The preoccupation of most of the industries with the whole question of price constantly led to efforts to extend the price filing plans into more rigid forms of control not contemplated in the original approval of the code.

The form taken by this administrative supervision and correction consisted, in a great many cases, merely of warnings to the code authority in question. While these warnings were probably effective in some instances, various cases to be cited below indicate definitely that sometimes the warnings were disregarded entirely, while at other times the warning was followed technically but the improper activity was carried on in some other form.

In certain instances corrective action went beyond mere warnings. the open price provisions were stayed in some cases; in others, industries were called upon to amend their codes; members of the code authorities were removed from positions of power in other cases.

As to its general character, one must conclude that the supervision was largely haphazard in nature, especially in the earlier NRA period. There were a number of reasons for this. The price-filing provisions themselves were very diverse in character, and for a long time uniform policy on the subject was entirely lacking. Initiative in the matter of

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(*) The material in the last two sections was prepared by Mr. Morrison Handsaker.

supervision rested largely with the individual Deputies. Complete records of code authority administration of open price filing plans were seldom received by the Administration. If received, such records were not always checked to insure proper administration by the industry groups. Broader questions, such as the trends of prices and their indication of the effect of the open price plans, tended to be considered only when some consumer, industry member or member of the Administration took exception to the way in which the plan was working out.

The individual economic philosophies of members of the Administration, especially the deputy administrators, had their effect. The record indicates that some of these persons were inclined to overlook a certain amount of price control activity carried on in connection with price filing. Indeed, in some instances, they appear to have been actively interested in promoting increases in price levels in the industries whose codes they were administering. The indeterminate status of price filing as a control measure, which has been indicated in earlier chapters of this report, further contributed to tolerance of such activities carried on pursuant to the code provisions.

This situation is more readily understood in view of the circumstances which surrounded the adoption of the price filing provisions. These provisions had been clearly desired by the industries, as quotations cited in another chapter indicate, in order to give them a measure of control over prices. Industry in general felt, correctly or incorrectly, that it was "entitled to price protection" in return for its shouldering of higher labor costs under the codes. Approval of the provisions was not unnaturally construed in many cases as extending also to the underlying purposes. Furthermore, many persons within the Administration were in accord with the efforts of the industries to increase price levels, as in line with the general aim of recovery.

Add to all this the fact already noted that the code provisions themselves were in many cases roughly and ambiguously drawn, and the difficulties of effecting any degree of uniformity in supervision are apparent.

In the following pages there will be considered certain of the administrative difficulties of NRA supervision arising out of the diversity of the code provisions, the lack of adequate data, and other circumstances. Formal NRA administrative action involving changes or interpretations affecting the provisions themselves, through the medium of amendments and administrative orders will be reviewed; and other supervision involved in the critical overseeing of the administrative actions of the code authorities will be outlined.

I. THE ADMINISTRATIVE PROBLEM OF SUPERVISION

A. Diversity of Open Price Plans.

A great variation in price filing provisions and price filing practices existed under the NRA. This variation, however, did not result from any deliberated plan to try different types of plans in order to

which was preferable. NRA experience cannot, therefore, be regarded as involving a genuinely "controlled" and intentionally varied government experiment with price filing. There were numerous reasons why NRA experience lacked the scientific significance of a carefully scrutinized study by the trial and error method. The original provisions were too dissimilar to fall into any well defined classes. They operated in every conceivable type of industry and competitive situation, within almost every known combination of code rules, under diverse managements and under the restrictions of changing policy standards. They were applied in industries where price filing had never been attempted, and in those where open price systems had already reached one or another stage of confusion, congealment or operating smoothness, under some prior regime.

The variations in the open price provisions were in fact largely accidental and unplanned, arising from haphazard draftsmanship and the circumstances of hasty code writing, as well as from the different states in NRA development at which they were approved. Conspicuous exceptions existed, however, in the case of industries whose price filing articles were drafted with a careful eye to all possible contingencies, and with a broad margin of residual power left in the hands of the administrative agency or code authority. In practice, these diversities in the form of the open price provisions were of comparatively little moment during the first months of code operations, when administration was left largely to the code authorities, with occasional rule-of-thumb decisions by the deputy who was in charge of the code.

Later, however, the gradual tightening of NRA restrictions and supervisory control over open price activities placed an importance on the precise phrasing of the powers conferred, quite out of proportion to the Administrative review this point had received at the time of code making. Experience introduced distinctions and questions of interpretation that had never been thought of at the time of code drafting. Both industry and the NRA resorted to refined analysis of the exact words that appeared in the provisions, ignoring the rough and ready way in which the provisions in most instances had been drafted. Omissions from open price articles were as seriously and literally interpreted as were the clauses that actually appeared. Reference to the transcripts and other documents of the code-making period for purposes of interpretation, might, in some instances of these early codes, indicate the intent back of a precise wording or an omission. More often it revealed a complete absence of discussion of the point.

The progressive steps in development of NRA policy about price filing were toward disapproval of the wide powers which had been granted in the early code days, and toward a refusal to incorporate such provisions in new codes. In spite of the effort at more strict interpretation of the provisions of the codes already approved, however, these provisions proved relatively pliable in the hands of the code authorities because of the lack of specific definitions, limitations and checks, which had been omitted in the original drafting. Furthermore, the industries were reluctant to consent to any change which would limit existing powers; and, under the basic NRA theory, amendments and modifications of the existing codes were dependent upon industry cooperation and agreement. NRA might interfere directly to prevent gross misapplication of code

powers in particular instances, but there was no will to attempt widespread compulsion to bring codes already approved into line with subsequent policies.

The issuance of Office Memorandum No. 228 (*) setting forth the revised policy toward price provisions, including price filing, made more and more difficult the obtaining of industry cooperation in moving toward a uniform situation as to price filing in the codes as a whole, since acquiescence in that Memorandum by industries operating under more liberal price filing rules would have meant surrender of the waiting periods and other prized forms of control.

This conspicuous lack of administrative control by NRA over going open price plans, except as it might stay certain portions of them, made it virtually impossible to shape the plans as a whole to any desired form, or to adapt them in the light of experience to particular situations or more considered policies.

In addition to the difficulties placed in the way of consistent NRA administrative supervision by the diversity of the price filing provisions themselves, there was, as the next section shows, the further handicap of lack of complete data as to the administrative work of the code authorities and actual filings under the provisions.

II. AVAILABILITY OF DATA ON WHICH TO BASE SUPERVISORY ADMINISTRATIVE ACTION

A. Available Records of Code Authority Actions.

During the course of the survey to obtain basic data on the open price filing plans of the 191 codes included in the initial sample for this report, information concerning NRA files of code authority bulletins and/or general industry letters, and of code authority minutes, was developed for 101 and 107 codes respectively.

The summary of findings as to Code Authority minutes received by NRA shows the following results:

	No. of Codes
No copies of minutes found	6
Occasional copies	5
Partial sets	7
Fairly complete sets	56
Complete sets of minutes	33

Code Authority Bulletins and General Industry letters found were reported as follows:

(*) This Memorandum, issued June 7, 1934, was the first definite and complete policy statement issued by NRA on price filing plans. It is discussed in detail in Section 'C' of this Chapter, below.

	No. of Codes
No bulletins or letters	44
Scattering copies	17
Fairly complete sets	24
Complete sets	16

1. Importance of Missing Records

The minutes of code authority meetings were supposedly available to the Administration and were, in the latter days of the Act, required to be examined and reviewed by the deputy's office. In many instances, they have been found to contain the only available record of resolutions and actions pertaining to the price filing plans. In only a minority of instances have complete sets of these minutes been located in the files. Characteristically, the minutes of the earlier meetings were the ones missing, and with them are missing the resolutions, rules and instructions that were originally adopted for setting up the price filing operations. For example, the digest of minutes for the copper and brass mill products industry, prepared by the Code Administration Studies Section, is full of references to action taken to amend rules, which are referred to by number, and which obviously pertained to price filing procedure. These amendments, however, are meaningless without the earlier records of action. Other examples of this lack of information are numerous. The absence of code authority bulletins and industry correspondence material is, as the above tabulation indicates, even more general.

B. The Collection of Price Filings

1. Absence of collected price filings.

There is a most conspicuous absence of collected price filings in the possession of the National Recovery Administration, despite the care taken to provide by code provision for access by the Administration to statistical information collected under the codes of fair competition, and the usual stipulation in price filing plans that the Administrator should be supplied copies of price filings upon request. No systematic efforts were ever made by the NRA to tap this ready source of price information and to utilize it in any organized fashion for studying the effects of open price filing or of other provisions affecting price.

At one time it was rumored that the Price Section of the Research and Planning Division, or some similar group, might be designated to receive copies of all price filing schedules and revisions filed under open price plans. (*) No action was taken to this end nor to build up price filing records, either for research or for current administrative purposes. The NRA lost ready access to the files of the code authorities with the invalidating of the codes by the Supreme Court decision in the

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(*) Objections, other than the question of policy involved in NRA assuming this role, were the obvious inadequacies of space and trained personnel to handle the volume of filings that would be received.

Schechter Case. At the present time it does not have in its possession complete records of the price filings for any group of industries sufficiently representative to be statistically adequate for general appraisal of the effects of open price filing.

One may say, with little qualification, that the price filing plans authorized by NRA codes fell far short of their potential value as a means of adding to the store of permanent statistical data on price movements, price levels and the composite structures in the industries concerned. Except through the courtesy of trade associations, available price statistics for the past two years of NRA operation are characteristically no better for industries that had open price provisions than for those that had none.

Such price filings as were assembled had usually been compiled because of specific complaints or immediate controversial issues, such as charges of collusive or monopolistic activity, or the request for emergency relief from destructive price cutting. Price filings were assembled for the carbon dioxide industry because some small members refused to file prices with the code authority and complaints of monopolistic practices were under investigation by the NRA and the Federal Trade Commission. Similarly, a body of price filings for the asphalt shingle and roofing industry was collected when that group was under investigation by the Department of Justice. The value of even these records is decreased by their fragmentary coverage, both as to period of time and number of companies represented.

Occasional attempts to secure price filing records were made by Research and Planning advisers or by Consumers' Board advisers, either on their own initiative, or at the suggestion and through the cooperation of the deputy in charge. Thus, the price filings for the paper distributing trade were regularly forwarded, at least for a period of time to a Research and Planning representative. They constitute one of the few sets of price filings that could be used for a comparative study of price movements under an open price plan. Similar isolated efforts also account for other incomplete sets of price filings located in NRA files. (*)

In general, initiative in requesting price filings was left almost entirely with the individual deputy. (**) The deputies had inadequate facilities for receiving or preserving such price filings. They had little time, and in most cases insufficient statistical training, to analyze them even when they were sent. There was reported to this staff at least one instance in which a code authority voluntarily forwarded copies of price filings, and was requested by the Deputy to refrain from doing so because of the lack of facilities for storing them.

(*) E.g., Baking; Tag Manufacturing; Kraft Paper.

(**) Two Office Memoranda are pertinent to this point. See Office Memorandum No. 332 NRA files, [illegible], defining duties of administration members and Office Memorandum No. 334 prescribing procedure for statistical reporting. See Appendix C Exhibit V for the text of the latter Memorandum.

Price filings sufficient to provide even fragmentary statistical information on the subject were located for only 55 codes, most of these in the individual code files of the Deputies.

It should be noted, moreover, that rarely was there any objective means of judging the completeness of the filings. This could be done in most cases only by direct check with the industry filing agency. Sample filings are, in many instances, the only available sources for determining the forms used in the filing of prices, the kinds of information furnished under the price filing plan, and the variety of terms and conditions of sale that prevailed. But even sample filings are not available for a significant proportion of the open price codes.

The following is a list of 56 codes for which partial sets of price filings were located in NRA files:

Agricultural Insecticide and Fungicide
All Metal Insect Screen
Alloy Casting
Asbestos
Asphalt Shingle and Roofing
Asphalt and Mastic Tile
Baking
Boiler Manufacturing
Business Furniture
California Sardines
Carpet and Rug
Cast Iron Boiler
Cigar
Compressed Air
Cooking and Heating
Cotton Cloth Glove
Envelope
Farm Equipment
Fibre Can and Tube
Fibre Wallboard
File Manufacturing
Fire Extinguishing Appliance
Funeral Supply
Gas Appliance
Gumming
Hand Chain Hoist
Heat Exchange
Iron and Steel
Liquid Fuel Appliance
Machine Waste
Marking Devices
Metal Tank
Metal Window
Non-ferrous and Steel Convector
Oil Burner
Paper and Pulp
Paper Distributing Trade
Preformed Plastic Products
Processed Fish Oil

Public Seating
Pump Manufacturing
Refractories
Rock and Slag Wool
Rubber Tire
Shovel Dragline and Crane
Steam Heating
Steel Castings
Steel Tubular and Fire Box Boiler
Stereotyped Dry Mat
Tag
Tool and Implement
Unit Heater
Upward Acting Door
Waxed Paper
Warm Air Furnace
Window Glass

Only 18 of the codes in this list, it is to be noted, are also in the list of 57 codes included in the open price sample.

III. FORMAL ADMINISTRATIVE ACTION

A. Infrequency of Formal Action

The formal actions of NRA in modifying open price provision and code authority activities pursuant to such provisions, were few compared with the total number of such open price provisions and the dynamic character of the activity authorized. Executive Order No. 6767 and Administrative Order X-48, the blanket stay on waiting periods in codes after the Price Hearing in January, 1934, and the issuance of Office Memorandum No. 228 containing approved policy for new and revised price filing plans, were, of course, general in their application and effect. (*)

Administrative actions affecting open price provisions in individual codes were sometimes taken in the form of administrative orders, sometimes in the form of amendments. Both forms were employed to accomplish essentially similar ends in similar situations. The use of the administrative order was generally favored. The large number of stays of open price plans, or parts of such plans, accomplished by administrative order rather than by amendments to codes, may be accounted for in the following several ways.

(1) Action could be taken in this manner without industry assent, if necessary;

(2) There was a common desire on the part of industries to avoid having their codes opened by a public hearing for general amendment of the price and cost provisions; and,

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(*) See Section 3 of this Chapter for discussion of the effect of these Orders and this Memorandum

(3) The administrative order form of action did not entail submission of the order for Presidential approval, printing of the amendment, etc.

B. Amendments Pertaining to Price Filing (*)

In all, only fifty-four amendments concerning open price filing were favorably acted upon by the Administration and inserted in approved codes. These affected only fifty-two codes out of the total number of four hundred and forty-four open price codes.

Six of these amendments were for the purpose of adding open price provisions to early codes that had not previously contained such provisions. These codes were:

No. 1 Cotton Textile (Thread Manufacturing Division)
No. 3 Wool Textile
No. 6 Lace Manufacturing
No.13 Fishing Tackle
No.38 Boiler Manufacturing
No.54 Throwing

Introduction of price filing in the first two codes was made optional, upon the vote of members of any division or sub-division.

An additional seventeen amendments were made to substitute the price filing provisions of Office Memorandum No. 228 for previous open price requirements. These were the following codes:

No. 396 Milk Filtering Materials
No. 312 Narrow Fabrics
No. 389 Clay and Shale Roofing Tile
No. 31 Lime
No. 115 Wood Pulp
No. 275-3Carbon Dioxide
No. 110 Hardwood Distillation
No. 83-A Soap and Glycerine (Pacific Coast Section)
No. 274 Saw and Steel Products Mfg.
No. 315 Industrial Safety Equipment
No. 58 Cap and Closure
No. 277 Gray Iron Foundry
No. 239 Porcelain Breakfast Furniture
No. 286 Beauty and Barber Shop Mechanical Equipment
No. 84-G Shoe Shank
No. 37 Builders' Supply
No. 362 Photographic and Photo Finishing

(*) In compiling the data on formal administrative action (including both amendments and administrative orders) contained in the succeeding pages, the following sources were utilized; Post Code Analysis Reports Nos. 37-E (Feb. 1, 1935), 37-F (April 25, 1935), No. 92-C, (May 23, 1935) and No. 110, (April 5, 1935) and "Orders on Approved Codes," seven volumes compiled by the Code Record Section and other specified sources.

Certain qualifications concerning the list just given should be noted. Two of the codes mentioned, those for the lime and cement industries, while they were amended to conform for the most part to the model established in Office Memorandum No. 228, departed from this standard in at least one important particular: i.e. both provided for a five day waiting period on price revisions. The lime amendment was approved April 1, 1935 and the cement amendment on May 11, 1935.

The change in the Builders' Supply Code was made in connection with the removal of the modal mark-up provision that had previously been approved by the Administration.

The amendment in the Hardwood Distillation Code was made at the request of members of the industrial alcohol industry who insisted that the open price provision in their own code could not become operative unless price filing was required on methanol (anti-freeze) manufactured and sold by the hardwood distillation industry. This amendment applied only to that product. A second amendment to this code extended the expiration date of the first amendment to June 16, 1935.

Eight amendments, to the codes for the steel casting, paper and pulp, macaroni, electrical manufacturing, steel package, standard steel barrel and drum, machine applied staple and job galvanizing industries, were made for the purpose of adding a prohibition against offers or bids to sell contrary to filed prices.

Nine amendments, to the codes for the small arms and ammunition, wholesale confectioners, household ice refrigerator, standard steel barrel and drum, mop stick, milk and ice cream can, machine screw chain manufacturing, and cork insulation manufacturing division of the cork industry, were for the purpose of eliminating the waiting periods in the price filing provisions at the request of the Administration.

The Code for the Dry and Polishing Mop Manufacturing Industry was amended at the request of the code authority to delete the price filing provisions. The codes for the vitreous enamel ware, cordage and Twine and furniture and floor wax and polish industries also had their price filing provisions deleted by code amendment.

Other amendments involved a considerable variety of matters. One change added filing of rental prices to the Code for the Construction Machinery Industry. In the iron and steel industry an amendment changed the open price provisions approved in the original code to conform to other new code provisions concerning voluntary membership. The waiting period and the right of the code authority to challenge and void filed prices were deleted at this time. The price filing provisions in the Plumbing Contracting Code were expanded by amendment in order to amplify the original brief section on bid filing. In the Code for the Artificial Limb Industry a sixty day limitation on upward revisions of prices was reduced to a 48 hour limit in conformity with Office Memorandum #228. The Macaroni Industry Code was changed to

require that contracts should correspond with prices on file with the code authority. The Machine Applied Staple Code was amended to forbid selling at variance from published price. (It previously permitted sales above but not below this price).

The Concrete Masonry Code was amended to provide for distribution of filed prices to all those applying for them and willing to defray costs, and for making lists available for inspection during all business days. The Mop Stick Code likewise was amended to provide for dissemination of prices.

The price filing provision of the Fasoline Pump Manufacturing Code was amended to exempt discontinued lines, obsolete or surplus stock from sale at list prices if properly filed with the Code Authority.

The oxy-acetylene industry (medical gas division) was amended to require filing of rental charges on cylinders and to make prices available to any interested parties.

In three codes, amendments were made in the open price filing provisions in order to correct typographical errors or to remove ambiguous language. These codes were those for the commercial refrigerator industry, fire extinguishing appliance industry and the metallic wall structure industry.

C. Administrative Orders Affecting Open Price Provisions of Individual Codes.

The large number of administrative orders affecting open price provisions in codes preclude a complete survey of all codes on this point; it has been necessary to limit discussion on this matter to a consideration of some of the orders applying to the fifty-seven codes in the open price sample. Administrative orders pertaining to these codes are of two types, stays and interpretations. Also because of time limitation, it has been impossible, in many cases, to trace each of the administrative orders back to the deputy files in order to get a complete picture of the situation prompting the order. The cases discussed below, therefore, should not be regarded as exhausting the subject.

1. Stays.

a. Stays on waiting periods; The orders approving codes stayed the waiting periods in open price provisions in 11 of the 57 codes in the open price sample. These were: lime, macaroni, ready mixed concrete, tag, canvas goods, retail monument, baking mayonnaise, wholesale confectionery, candy and two supplements to the code for the business furniture industry.

b. Temporary stays: In a number of instances temporary stays were ordered to permit completion of organization of the price filing plan or to make possible attempts to restore order in a price situation before continuing with price filing, or for other purposes. Such temporary stays were granted in the filing supply industry, (as far as adherence to filed prices was concerned), in the baking industry,

in the heel and sole division of the rubber manufacturing industry, in agricultural insecticide, wood cased lead pencil and scientific apparatus.

A temporary stay was placed on the portion of the price filing provisions of the Code for the Scientific Apparatus Industry which prohibited filing of prices below cost, cost to be determined by a formula to be approved by the Administration. Since no such formula had been approved, the Legal Division held invalid the part of the price filing plan referring to it, and made necessary the granting of the stay.

The stay on the price filing provisions of the Baking Industry Code was requested by the industry, since they felt they did not have the organization or the financial support to handle price filings from the multitudinous retail bakers. A stay, accordingly, was put on filing by retail bakers. This stay, it should be added, was continued in practical effect informally, even after it expired and was not renewed. The retail bakers simply failed to file prices and nothing was done about it.

c. Permanent Stays.

A number of provisions were stayed until June 16, 1935, the termination date of the Act, and hence such stays were equivalent to deletion in their intent and effect. Price filing was stayed in this fashion in the marking devices and canvas goods codes.

Other stays, such as that in the agricultural insecticide industry pertaining to sales between industry members, were for the purpose of excepting certain products or types of transactions from the operation of price filing.

The entire price filing plan was stayed in the order approving the Macaroni Code. Later this stay was modified so as to apply only to the waiting period. This modification was made because the Macaroni Code had been approved just at the time of the issuance of Office Order No. 63. As is noted in a later section, this order, which required stays on all open price provisions, was, two days after its issuance, changed so as to provide for stays only on waiting periods. The change in the stay on the code for the Macaroni industry was made to correspond to the change in the order.

Another type of stay arose because restrictive features of certain codes conflicted with tolerances established for price quotations to government buyers, established by Administrative Order X-48 or Executive Order No. 6767. Several stays of this type were granted for the Business Furniture Code and supplements.

Some permanent stays affecting all or parts of price filing provisions, were definitely due to abuses of open price provisions. Such was the case in the candy manufacturing industry, the canvas goods industry, the Mechanical Rubber Goods Division of the Rubber Mfg. Industry, the Marking Devices Industry, and perhaps others.

2. Interpretations: A considerable number of interpretations of price filing provisions were issued by the NRA by means of administrative orders. The indirect effects of these orders were probably greater in scope than the number of codes directly affected because of the establishment of precedents by which informal interpretations were given to other industries faced with similar questions.

Six of the interpretations listed pertained to the fertilizer industry.

In general, the interpretations cover minor questions of procedure or precise meaning of the code provision, and since they are limited strictly to the code provision in question, they cannot be considered as general interpretations of policy.

Certain interpretations deal with the question of the "date of filing," or the "effective date" and are consistent in declaring that the date of receipt by the code authority is the date of filing, and that if there is no waiting period, it is also the effective date of prices.

Most of the interpretations are of interest only because they illustrate (1) the numerous problems raised in connection with the price filing procedure, (2) the imperfections in the open price provisions themselves, which limited their effectiveness as publicity and as control measures, and (3) the fact that interpretations were ordinarily very strictly limited by the wording of the provisions in question.

The following summaries of interpretations are examples:

> Article VII, Section 1 (a), of the Crushed Stone, Sand and Gravel Code, which prohibits secret rebates, and "extending to purchasers special service or privilege not extended to all purchasers under like terms and conditions," was interpreted to prohibit a member from making secret and confidential disclosure of a price or terms which he proposed to file at a subsequent date.

> Order No. 275-B-21 Carbon Dioxide
> Facts: A member filed a schedule of prices with the notation: "In view of competitive prices published as low as 3½¢ per lb., we reserve the right to sell or offer to sell our Carbon Dioxide under open market or contract at this minimum."
> Question: Is this filing in accord with code as amended August 16, 1934? (Office Memorandum 228) Interpretation: No. (*)

(*) The code required a complete new schedule to be filed in making revisions. The above interpretation would appear to prevent partial meeting of competition on the same date, or the meeting of prices on one grade without changing the entire schedule to conform.

Order No. 67-22 Fertilizer
Facts: We are producers and have listed prices for 20 different grades. A customer wants to buy a car of a grade that is not covered by our schedule.
Question: May we sell to him at prices quoted by a competitor who makes the grade he wants to buy?
Interpretation: No. You may not sell or offer for sale except at the prices specified in your own schedule.

The following interpretation is of particular interest because of the attitudes expressed toward publicity and no-selling-below cost provisions, both of which have been discussed in earlier sections.

Order No. 458-22, Wholesale Confectioners' Code
Facts: Members are required to keep price lists on file and to adhere strictly to prices and terms. Article VIII, Rule 5 (a), Selling Below Cost, states, "No member of the industry shall sell any candy at a price below cost, as determined pursuant to the provisions of Article VI, Section 14(k); except that a member of the industry may meet the lower prices of a competitor - - -." Article VI, Section 14, provides for recommendation by the Code Authority of elements of cost to become binding upon approval of the Administrator. The elements thus recommended were never approved.
Question: (1) Under such a state of facts, does the code prohibit a member of the industry from filing a price which is below cost figure either in accordance with his own cost finding system or that recommended by the Code Authority?
(2) Under such state of facts, does said code prohibit such member of the industry from selling at such filed price even though it is below cost?
Interpretation: 1. The code does not prohibit a member of the industry from filing a price which is below cost, figured either in accordance with his own cost finding system or that recommended by the Code Authority.
2. Under such a state of facts, said code does not prohibit a member of the industry from selling below cost if he sells at his filed price. Article VII, Rule 5 (a), only prohibited selling below cost as determined in accordance with elements of cost (i.e., a cost finding system approved by the Administrator or the National Industrial Recovery Board, pursuant to Article VI, Section 14 (b), and no elements of cost or cost finding system has been so approved.

One further example illustrates the ambiguity of a price filing provision. This request for interpretation was received from the legal counsel of the code authority.

> Order No. 153-18. Valve and Fittings.
> Facts: The price filing provision requires filing of prices to each of the trade factors defined in Article II "provided that the lowest prices that may be filed shall be the prices at which he shall sell his products to his distributors - - -."
> Question: (a) "Do these provisions mean that each member of the Industry may file prices to any or all trade factors as low as prices filed by him for distributors?
>
> (b) Do these provisions mean that prices filed by all members of the industry for their distributors must be lower than prices filed for all other trade factors?
>
> (c) Does the term "his distributors" mean that each member of the industry must differentiate between distributors whom he had sold or regularly sells and other distributors?
>
> Interpretation: (a) These provisions do mean that any member of the industry may file prices to any or all trade factors of the industry as low as prices filed by him for his distributors if he so elects.
>
> (b) These provisions do not mean that prices filed by all members of the industry for their distributors must be lower than prices filed by them for all other trade factors.
>
> (c) The term "his distributors" does not mean that each member of the industry must differentiate between distributors whom he has sold or regularly sells and other distributors.

IV. CORRECTIVE ACTION THROUGH CRITICAL SUPERVISION OF CODE AUTHORITY ACTIVITIES.

A. Character of NRA Supervision.

The heterogenous mass of rules and regulations which were adopted by the various code authorities may explain many of the laxities of NRA supervision that occurred in connection with open price filing. Characteristically, all such regulations were subject to the review of the administrator or his assistants. Actually, many were never conveyed to the Administration. If they were so conveyed - as, for instance, in

the body of minutes of code authority meetings, in copies of Bulletins sent to members of the industry, or in commercial resolutions, - they often never saw the light of day until some resistance on the part of a dissenting industry member, complaint on the part of buyers, or other overt sign of dissatisfaction was sufficiently disturbing to the code authority, the deputy's office or one of the divisions or advisory boards, to demand their attention and review. (*)

The first attempt at systematic review of code authority activities which were not specifically referred to the Administration for review followed the issuance on February 13, 1935, of Office Memorandum #336 stipulating that code provisions making actions of the code authority subject to administrative disapproval were to be interpreted no differently than code provisions requiring approval of those actions.

The appointment, beginning in August 1934, of full-time administration members, with certain responsibilities for keeping a close check upon all code authority meetings and records, had likewise been a step toward a more thorough and current survey of these activities, but its effectiveness was limited by the lack of any comparative guidance for these members as to permissible activities. Standards were lacking for such guidance. Even when flagrant examples of misuse of the price filing provision were disclosed, the practices complained of were often so remote in time that a request for retraction of a code authority action had little power to undo the effects of the action.

(*) Members of code authorities, it appears, felt in some instances that their bulletins, from pressure of time or other reasons, would not be scrutinized by the Administration. Mr. G. G. Hoskins, of the Macaroni Code Authority, in a letter to Dep. Administrator Walter White, dated April 12, 1934 says: "...You will not have had a chance to read the big batch of bulletins I sent to you under date of April 7 but in this we lay out a definite procedure for enforcement and we had supplemented these bulletins with instructions to our regional chairmen asking that they call regional meetings prior to April 17 and require that new prices are filed along the lines of our bulletin No. 13 ..... I am writing this letter because if you do have a chance to review our Bulletins you are bound to get the impression that we are putting most emphasis on price. You, of course, know as well as I do that this is the thing which manufacturers are most interested in, but I want to assure you that from my standpoint I am just as resolved to enforce the labor and standards provisions as I am the sales below cost provisions....." (Underlining by author).

Occasionally, however, even before this, a blanket survey of code authority actions in particular industries was undertaken by the Administration, and some general corrective action taken. Thus, on June 7, 1934, the division administrator wrote to the code authority for the fire extinguishing appliance industry reviewing all the numbered rulings and interpretations made by that body between November 4, 1933, and June 7, 1934. As a result of 12 rulings were approved. Of this number, those more or less bearing on open price filing were as follows:

Ruling #5 Extension of time limit for filing prices. (*)

Interpretation #12 Government sales on open quantity.
Interpretation #13 Government sales on specified quantity.
Ruling #25 Filing outstanding contracts and blanket order.
Ruling #27 Collecting of individual costs.
Ruling #28 Sales reports
Ruling (Bulletin #42, May 2, 1934) Dropping fractional cents on net price
Ruling (Bulletin #43, May 9, 1934) Dropping fractional cents on extended prices

The disapproved rulings bearing directly or indirectly on price filing included a much larger list as follows:

Ruling #2 Definitions of trade factors revised
Ruling #3 Price differentials
Ruling #4 Representative costs
Ruling #7 Establishing of 3 product groups
Ruling #9 Definition of manufacturer
Ruling #14 Limitation on government sales to 3 months' quotations
Interpretation #16 Definition of trade areas revised
Interpretation #17 "Distributor" classification
Interpretation #18 Standard distributor's contract form
Ruling #19 Standard contract form revised
Ruling #20 "Very large user" additional classification
Interpretation #21 Very large users, public institutions
Interpretation #22 Very large users, small plants
Interpretation #23 Education of trade factors
Ruling #24 Sales differential for "Class B" manufacturers
Ruling #26 Uniform classification of accounts
Ruling #29 Manufacturers of limited scope
Ruling #30 Application of "selling below representative cost"
Ruling #31 Application of "selling below representative cost"
Ruling #32 Limiting minimum delivery promise on public bids
Ruling #33 Export sales below "representative costs"
Ruling #35 Making Administrative Order X-7 part of the code.

(*) From November 24 to December 14, inclusive. See letter of Nov. 21.

A total of 25 out of thirty-seven consecutive rulings were not accorded Administrative approval. Most of these, quite obviously, had a bearing on prices and terms that could be filed.

Many of these rules had been issued during the period of time between the approval of the Fire Extinguishing Appliance Code, on November 4, 1933, and the effective date of price filing on December 14, 1933, NRA permission for such delay had been granted (through the deputy's office) and specific letters and telegrams of approval for the definition of trade factors, etc., had been given by the assistant deputy administrator. (*)

The letter transmitting the disapproval of NRA conveyed the request that the code authority:

> "Bulletin the industry on all rulings disapproved by the Administrator and to send copies of such bulletins to NRA at the same time.
>
> "You are furthermore requested to place in our hands at least five (5) days prior to release, any ruling on matters specified in the code as subject to review or disapproval by the Administrator. On matters specified in the code as 'subject to the approval of the Administrator' written approval from us is a prerequisite to release of Code Authority information in the Industry."

In connection with this incident, it is interesting to note that the writer of the Code History for this industry states: "In effect a complete price rigidity was established, as evidenced by copies of price filings of 49 industry members." (**)

(*) On December 12, 1933, Mr. J. Reed Lane, Assistant Deputy Administrator of the code for this industry, wrote to Mr. A. O. Boniface of the Code Authority approving a number of matters which had been submitted to him by Mr. Boniface. On December 13, 1933, Mr. Boniface wired to Mr. Lane to make sure that the definition of trade factors had been approved. His wire read: "Is your letter of December 12 intended to include approval of definitions of trade factors?" Mr. Lane's answer, sent by telegraph the same day, read: "Trade Factors included in approval of differentials." Letters and telegrams in NRA Deputy's files, Fire Extinguishing Appliance Industry.

(**) Code History, Fire Extinguishing Appliance Industry, page 44.

Another instance of NRA check of the contents of code authority bulletins and of code authority rulings which merits attention concerns the gas appliances industry. In this case, even after an understanding concerning corrective action had apparently been reached, such action was not taken by the code authority.

When the administration of this code was transferred to F. P. Combier, Assistant Deputy Administrator in November, 1934, it was decided, after a detailed study of the files and records available, that it should be suggested to the code authority that a meeting be held in Washington to discuss the various points at issue.

At this meeting a number of points were listed by the Administration representatives which were called to the attention of the Code Authority for action. (*) Among these were:

> "1. Definitive withdrawal of Rule 8, paragraphs 3 and 4, and Rule 9 of the published 'rules' of the Code Authority."

These rulings had resulted in the establishment of a waiting period, the approval of prices by the code authority, and the requirement for a certificate that filed prices were all above cost.

> "2. Definitive withdrawal of the instructions to the industry from the Code Authority contained in Bulletins Nos. 3, 5, 6, 15, 25."

These bulletins covered rules regarding the operation of the administrative committee; complaints procedure; rules regarding price filing.

> "3. Definitive withdrawal and cancellation of action of the Gas Appliances Committee at its meeting of February 14, 1934 approving a resolution regarding 'gas space heaters.'"

These resolutions covered various mandatory sales terms, such as cash and quantity discounts, etc., on sales of gas space heaters.

> "4. Definitive cancellations and withdrawal of resolution of the Gas Appliance Committee at meeting of June 14, 1934 approving 'trade rules of the Association of Tank Water Manufacturers.'"

These trade rules provided for a multitude of mandatory sales terms and conditions intended to govern sales of tank water heaters, such as transportation allowances, extras and discounts, invoices, guarantees, classification of customers, etc.

(*) Code History, page 39 and Addenda to Code History, Exhibit B, Volume B-2.

As a result of this meeting, it was understood by the Administration representatives that the following actions (*) would be taken:

"1. The Counsel for the Code Authority was authorized to confer with the Administration looking toward agreement on corrections necessary

"2. The Counsel of the Code Authority was authorized to make the necessary corrections.

"3. The Counsel was to report on action taken at the next meeting of the Code Authority."

This understanding was evidently not mutual, for the "Manual" issued by the code authority on January 15, 1935 restated most of the rules and regulations which were objectionable to the Administration. As a result of this action, it was decided to refer the matter to the National Industrial Recovery Board. Accordingly, a detailed report (**) was prepared and forwarded to the board through D. M. Nelson, Code Administration Director, on February 30, 1935.

Pressure, focused on the objectionable paragraphs of Rule 8 and on Rule 9, was continued by the assistant deputy administrator, who insisted on the withdrawal of these regulations and so advised the code authority. This decision was appealed and a conference was held before D. M. Nelson, Code Administration Director, which resulted in the withdrawal of these regulations. (***)

Still another, somewhat different, instance of NRA supervision of code authority activities may be cited in the asphalt shingle and roofing industry. Shortly after the code for this industry was approved, the code authority issued simultaneously a number of bulletins, most of which bore on price filing. These were later recalled by order of the Administration. (****)

As a result of this experience, "....Assistant Deputy Administrator William Lawson established the policy, which was continued during the life of the code, of reviewing the Bulletins and Explanations of the Code Authority before they were distributed to the Industry.

(*) Code History, page 40.

(**) Addenda to Code History, Exhibit B, Volumes A and B.

(***) For further details on this, see the report on this industry appended to the preliminary report of the Price Filing Unit, November, 1935. The above has been taken largely from that report.

(****) See J. W. MacKenzie's "Preliminary Report on the Administration of Trade Practices by Code Authorities," Code Administration Studies Section, Division of Review, December 1935, pages 23-25.

While it does not appear that the contents of these documents were frequently altered as a result of these previews, the fact that the Code Authority was aware of this supervision might in itself have acted as a desirable influence. .....the Code Authority rather welcomed this supervision; the Institute and most of the members of the Code Authority were operating under the cloud of the Department of Justice complaint and were glad to have an official approval of all of their activities....." (*)

Instances such as the foregoing were, however, the exception rather than the rule in NRA supervisory dealing with the actions of the code authorities.

The following section illustrates the elaborate and minute regulations as to price filing frequently laid down by the code authorities, and the need for careful supervision which these entailed.

(*) Quoted from report on the Asphalt Shingle and Roofing Industry contained in Appendix A of this study.

B. Supervision Required Because of the Minuteness of Code Authority Regulations

Code authorities in certain industries tended to lay down elaborate and detailed rules concerning price filing which were not authorized by the code under which they were operating. This was one important factor making supervision by the Administration highly important.

The minuteness with which code authorities attempted to iron out slight variations in competitive opportunities is illustrated by numerous rulings designed to govern the dropping or retaining of fractional parts of a cent in unit quotations and in the extended totals. In the Tag Manufacturing Price Book, the rules for treating these fractional figures constituted an important section, because varied practices in this regard would be quite sufficient to throw a bid one way or another, and even when competitive bidding was not at stake, the compilation of a price from the various price elements that were filed under the code demanded meticulous observance of the "lowest price on file."(*)

Fractional cents also were a matter of deep concern to at least one branch of the rubber industry. The following code authority bulletin tells its own story:

"To members of the FIRE HOSE GROUP

Subject: Official Filing of Prices, Forestry Hose - U. S. Forestry, Portland Oregon.

Gentlemen:

"On January 27 the above opened bids for 15,700 feet of 1-1/2" Forestry Hose, coupled. The filed price is .3456 per foot, making a total of $5425.92 off which the Government was entitled to deduct 15% at settlement.

"The following companies bid .2937 per foot; in other words, deducting the 15% themselves, which would make a difference of 94¢ on the total bid if the Government deducted their 15% from the total quoted price.

(Then followed a list giving the names of several concerns)

"We contacted the interested companies and they wired to correct their bids.

"We also wired the Purchasing Officer at Portland,

(*) Tag Manufacturing Price Book, NRA files: "Price Filing in the Tag Manufacturing Industry."

protesting the bids in view of the fact that they were below filed prices.

"As soon as we know the outcome will advise you."(*)

The blocking of another loophole that might lead to variations in price quotations was undertaken by the code authority for the valve and fittings industry. A bulletin of the code authority for this industry, dated April 30, 1934, contains the following: "....At a meeting of the code authority April 3, 1934, a motion was duly made and seconded and the following resolution unanimously approved:

> " 'Resolved that when valves, pipe fittings, fire hydrants and/or accessories of special design and/or specifications are called for, manufacturers shall include in their quotations an added adequate consideration for the additional work and for material involved. In no instance, however, shall the prices quoted on special valves, pipe fittings, fire hydrants, and/or accessories be less than the minimum prices on file with the Code Authority for a like product which is normally available to the trade...'" (**)

That there was some attempt to offer lower prices to persons calling for bids on special specifications is clear. The minutes of the meeting of that code authority for February 13, 1935, contain a copy of a wire to the Commissioner of Public Works of the City of Chicago, "submitting for your information" that three companies complained against had bid to the City of Chicago on special specification jobs at prices "substantially" lower than those they had on file for similar standard items. Complaints were lodged with the code authority concerning these three firms but the record does not indicate what action, if any, was taken.(***)

Sales taxes in various states were also an element of concern to several codes. Envelope manufacturers in Iowa complained

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(*) Code Authority Bulletin sent to Mr. A. D. Kunze, Secretary of the Mechanical Rubber Goods Divisional Code Authority to members of the fire hose group in the industry, on March 1, 1935. A copy of this bulletin is in the file of Chief Examiner of the Federal Trade Commission to whom it was sent by Mr. Marshall Mayes, NRA Liason Officer, to the Federal Trade Commission.

(**) Bulletin in NRA files, valve and fittings manufacturing industry.

(***) Minutes in NRA files, valve and fittings manufacturing industry.

that the 2% sales tax that existed in that state was resulting in business being diverted to manufacturers outside the state. Here again the members were to abide by the lowest price on file. The meeting voted to permit adjustments to take care of this unfair competitive situation.

The iron and steel code authority or board of directors also gave permission to members who sell intrastate in the States of California, Oregan, and North Carolina to reduce their base quotation by the amount of the sales tax imposed by the laws of those states. (*)

Another attempt made to prevent variations in proce quotations was by anticipating and forbidding every loophole for price variation. Thus, the Commercial Resolution of the Iron and Steel Code Authority, setting forth the maximum discounts on woven wire fencing, required that interest must be charged at the rate of 6% after the period of free credit. This requirement was inserted because of the fear that the waiver of or the failure to charge it "might be employed as a means of unfair competition and of securing secret advantage." Rigid insistence on this requirement in the case of small invoices, caused such irritation that the board by special resolution authorized the waiver of interest not exceeding 99 cents on the aggregate monthly sales to a given purchaser.(**)

The extent and difficulty of the administrative task involved in keeping continuous check upon the regulatory activities of the code authorities in the whole group of open price codes, is evident.

C. Administration Supervision and the Problems of Confusion Between Code Authority and Trade Association Functions

The close link which often existed between the trade associations of various industries and their respective code authority codies, often added to the necessity and increased the difficulty of maintaining effective supervision over the latter. Actions and functions which were challenged in the hands of one, might be transferred to the other in a manner

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(*) Resolution No. 24. See Federal Commission Report on the Steel Code, March 12, 1934, page 10. This report points out that "conditions of unfair competition might be created" if this were not done. This permission was given despite the fact that state laws prohibited the seller from assuming or abosrbing the sales tax.

(**) Resolution No. 32. Reference, Federal Trade Commission Report, op. cit. p. 12.

not always easy to follow or trace.

Thus, we find the Metal Window Code Authority warned by the NRA that the bid checking bureaus which had been set up as enforcement agencies to further the operation of their price filing plan, were not anywhere sanctioned by the code and that they must be disavowed immediately, or not later than the meeting on July 31, 1934. Letters were to be sent to each representative informing him that the bureaus were not properly authorized in the code. Copies of these letters were to be forwarded to the Administration. The metal window code authority acceded to this order, and we find the minutes of the meeting for July 31, 1934, recording a resolution that the bid checking bureaus under the auspices of the code were to be terminated as of 12 o'clock midnight, July 31, 1934, and were to be transferred as of 12.01 A. M. August 1, 1934, to the auspices of the Metal Window Institute.(*)

Apparently the action of the Administration in this matter was precipitated by the inclusion in the proposed budget and basis of assessment of amounts for the operation of these bureaus. The letter of notification to the code authority condemning the bid checking bureaus indicated that it would be necessary for the code authority to submit a new budget. This was done, but we find later bulletins from the code authority to members of the industry, indicating that the services of the bid checking bureaus were available to members to avoid violations of filed prices, although expenses were paid by the metal window institute. There are further indications in later bulletins that the enforcement committees, working in close cooperation with these bureau representatives, were hearing complaints of code violation and assessing liquidated damages under the plan authorized by the code; funds thus acquired were turned over for the support of code enforcement activities.

The line of demarcation here is to wavering to be traced in positive terms, but the official transfer of activities from code to trade associations was assumed to have removed the matter from the hands of the deputy in charge of the code. This was pointed out by him in later memoranda covering the bid checking bureaus.

Other illustrations might be given, but the foregoing indicates the general nature of this type of problem.

D. Supervision preceding Action (Preventive)

(Supervision Before Acts Were Performed)

Instances where activities of the code authorities beyond the

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(*)"Rule Book Containing All Approved NRA, Code Authority and Metal Window Institute Regulations Applying to the Metal Window Industry", pages 28 to 42. In NRA files.

powers given them in the price filing provisions were subjected to criticisms and corrective action by the NRA were numerous. Certain of these have been described elsewhere in the report. Here it seems desirable to supplement these cases with other examples drawn from the work sheets on the codes included in this study's preliminary sample. It is not possible to give all the details, either of the charges preferred, or of the beginning or the end of the regulatory action, without further study of the records; but the general nature of the action and its relationship to price filing can be indicated.

In the instances cited below are presented cases in which supervisory action supervened to prevent the commission of some irregular code authority action. The section following will present instances in which corrective measures were employed after the act was committed. In each category various types of cases, not mutually exclusive in every instance, are classified and described.

In a number of instances, preventive supervision was brought about through submission by the code authority of proposed rulings or actions for Administration approval, either because the code provision required administrative approval, or because the code authority wished to avoid overstepping its authority. The types of questions raised are treated separately below.

1. Rejection of Price Filings by Code Authority

One instance of the preventive type of administrative supervision relates to rejection of price filings. Pursuant to a resolution adopted by the fertilizer recovery committee, Mr. Brand, executive secretary of that committee, wrote on January 24, 1934, to Deputy Berry requesting an opinion on the legality, under the Code, of examining all filed schedules as to compliance and rejecting those which did not comply. The Legal Division, in a document bearing no date, disapproved of this procedure.(*)

2. Mandatory Uniform Terms

The Pittsburg marketing area of the ready mixed concrete industry, on September 28, 1934, submitted for Administration approval uniform terms of sale and credit practices, pursuant to Section 3 of Article VII of the code. These proposed rules were scrutinized by the various boards and divisions of the NRA and were subsequently revised. Final approval however was never given because, according to the writer of the Code History for this industry, there was a "lack of established administrative policy."(**)

(*) NRA files, fertilizer industry code authority minutes.

(**) Code History for the Ready Mixed Concrete Industry, page 43.